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No. 827

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

ARKANSAS PUBLIC SERVICE COMMISSION and FIRST ELECTRIC COOPERATIVE CORPORATION ..... Petitioners

V.

ARKANSAS POWER & LIGHT COMPANY .. Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF ARKANSAS

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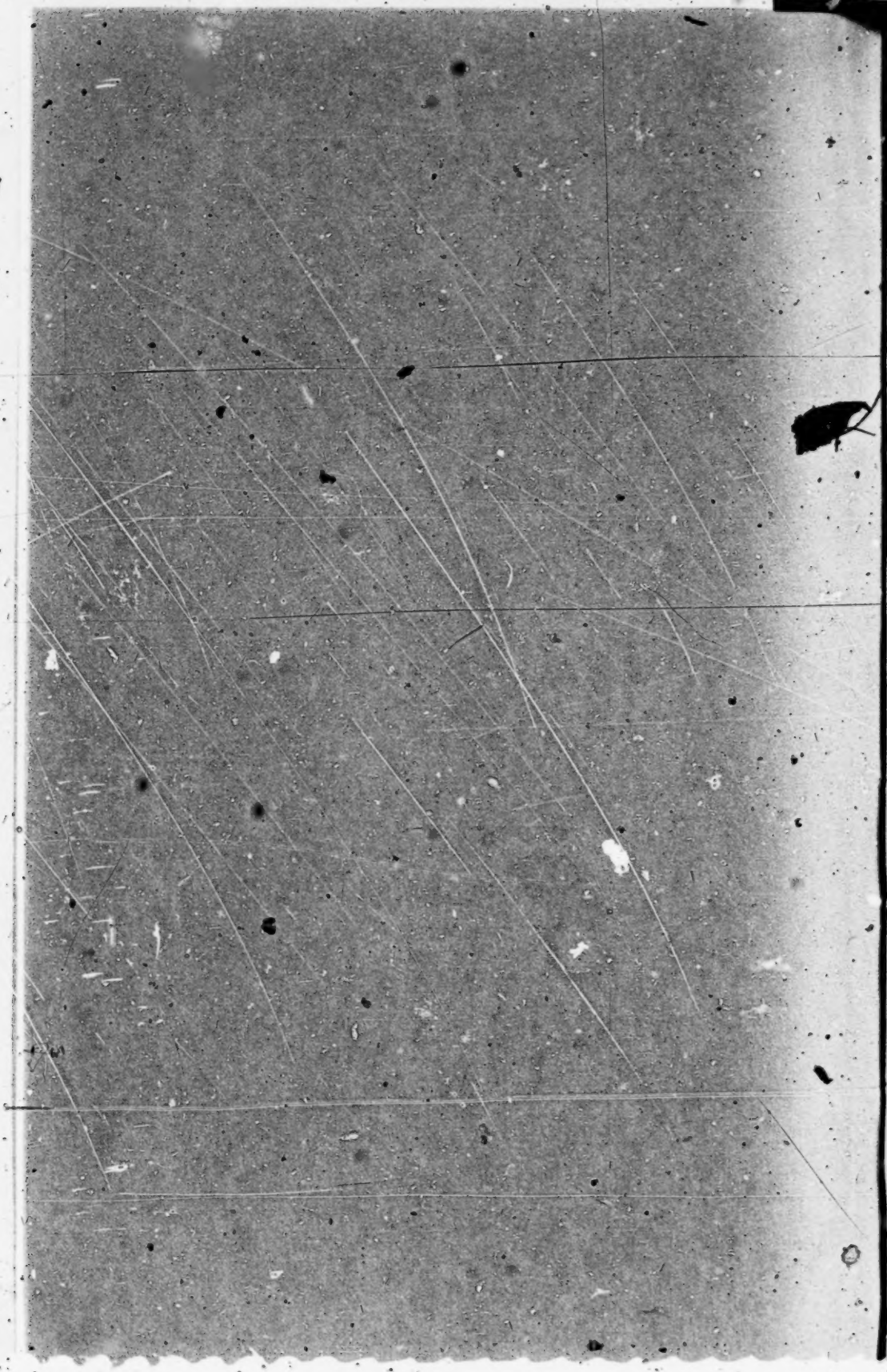

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

ARKANSAS PUBLIC SERVICE COMMISSION and FIRST ELECTRIC COOPERATIVE CORPORATION ..... Petitioners

V.

ARKANSAS POWER & LIGHT COMPANY .. Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF ARKANSAS

The petitioners pray that a writ of certiorari issue to review the decision of the Supreme Court of Arkansas and the denial by that Court of the petition for rehearing in this matter, and for cause state that:

Opinions of the Tribunals Below

The Supreme Court of Arkansas rendered its decision in this matter on November 2, 1959, by a 4 to 3 vote reversing the decision of the Arkansas Public Service Commission and the decision of the Circuit Court of Pulaski County, Arkansas. The decision of the Supreme Court of Arkansas became final upon that court's denial of a petition for rehearing of the matter on January 11, 1960. The ma-

jority and dissenting opinions of the Supreme Court of Arkansas, as yet unpublished, are appended hereto, as are also the decisions of the Arkansas Public Service Commission and the Circuit Court of Pulaski County, Arkansas.

JURISDICTION

The statutory provision believed to confer jurisdiction on this Court is Title 28, United States Code, § 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

The questions presented are as follows:

(1) Can a judgment stand, consistently with due process of law, when the direct effect thereof is to nullify the rights of a rural electric cooperative corporation flowing from (a) a contract between the rural electric cooperative corporation and a public utility whereby the public utility agrees to supply the rural electric cooperative corporation with electricity for sale in the latter's territory allocated to it by the state regulatory body, and (b) a certificate of public convenience and necessity granted by the state regulatory body to the rural electric cooperative corporation to supply with electricity the territory in question, merely because the public utility voluntarily contracts with the Government to supply it with electricity for use in the aforesaid territory?

(2) Can a judgment stand, consistently with equal protection of the laws, when the direct effect thereof

is to transfer the rights of a rural electric cooperative corporation without consideration to a public utility under the circumstances stated in Question (1)?

(3) Has the Government submitted its purchase of electricity for the Little Rock Air Force Base to regulation by the state regulatory body, irrespective of the Supremacy Clause of the United States Constitution, by virtue of its contract with the public utility involved, the Arkansas Power & Light Company?

(4) Does the Supremacy Clause of the United States Constitution operate to oust the state regulatory body of jurisdiction with respect to an area owned by the Government, but as to which the Government has never acquired jurisdiction?

CONSTITUTIONAL PROVISIONS INVOLVED

(1) United States Constitution — Amendment XIV:

(a) Due Process Clause.

(c) Equal Protection Clause.

(2) United States Constitution — Article VI:

(a) Supremacy Clause.

UNITED STATES STATUTORY PROVISIONS INVOLVED

(1) Title 10, United States Code, § 9773.

(2) Title 40, United States Code, § 255.

(3) Title 50, United States Code, § 491.

ARKANSAS STATUTORY PROVISIONS INVOLVED

(1) Act 571, Ark. Acts of 1919, § 5, as amended by Act 124, Ark. Acts of 1921, § 3 [Ark. Stats. (1947) § 73-115 (a)].

(2) Act 342, Ark. Acts of 1937, § 2, as amended by Act 85, Ark. Acts of 1955, § 1, as amended by Act 103, Ark. Acts of 1957, § 1 [Ark. Stats. (1947) § 77-1102].

(3) Act 342, Ark. Acts of 1937, § 31, as amended by Act 85, Ark. Acts of 1955, § 2, as amended by Act 103, Ark. Acts of 1957, § 2 [Ark. Stats. (1947) § 77-1131].

STATEMENT

The First Electric Cooperative Corporation, a rural electric cooperative corporation (hereinafter referred to as the Cooperative), was providing electricity to consumers in areas in Pulaski County, Arkansas, allocated to it by a certificate of public convenience and necessity by the Arkansas Public Service Commission, the state regulatory body (hereinafter referred to as the Commission), and the Arkansas Power & Light Company, a public utility (hereinafter referred to as the Power Company), was providing electricity to consumers in areas in Pulaski County, Arkansas, allocated to it by the Commission, when the United States Government (hereinafter referred to as the Government) established the Little Rock Air Force Base near Jacksonville in Pulaski County, Arkansas. This air base was established in an area, a part of which had been allocated to the Cooperative, and a part of which had been allocated to the Power Company.

When construction was begun at the air base, the Cooperative, the Power Company, and all others having any property in the air base area were required by the Government to remove it. Both the Cooperative and the Power Company were paid for any interest they had in the land and were compensated for the removal of their other property.

The location of the air base and the territorial allocations to the Cooperative and to the Power Company are shown in Exhibit 2 at p. 283 of the transcript.

The first construction of the air base was entirely within the area allocated to the Power Company, and, of course, the Power Company was entitled to serve any consumer of electricity within this area. However, during the

latter part of 1957, the Government, in contemplation of the construction of permanent housing facilities for air base personnel within the air base area, but in the area with respect to which the Cooperative held a certificate of public convenience and necessity, negotiated a contract with the Power Company by which the Power Company agreed to provide electricity for use by the Government in this area. The contract is dated August 30, 1957, with amendment dated October 4, 1957 (T. 274). This contract specifically provided that the Commission would regulate the service provided thereunder. The pertinent provision of the contract is as follows:

> "5. PUBLIC REGULATION AND CHANGE OF RATES. (a) Public regulation. Service furnished under this contract shall be subject to regulation in the manner and to the extent prescribed by law by any Federal, State, or local regulatory commission having jurisdiction. * * * (b) Change of rates. * * * *." (T. 249)

The transmission facilities inside of the air base boundaries are entirely owned by the Government and the Government obtains electricity outside of the air base boundaries at a substation of the Power Company. The substation is within the area allocated to the Power Company. In short, the Government receives the electricity from the Power Company within the area allocated to the Power Company and transmits such electricity over Government facilities into the area allocated to the Cooperative where it is used by the consumers. Upon learning that the Power Company intended to furnish electricity for that part of the housing project of the air base which is within the area allocated to the Cooperative, the Cooperative on

September 23, 1957, filed its complaint with the Commission, stating that the Power Company had commenced serving and offering to serve or provide electricity in the territory which had previously been allocated to the Cooperative in violation of the certificate of public convenience and necessity theretofore granted to the Cooperative and contrary to the laws of Arkansas.

As a result of the hearing held before the Commission on the complaint of the Cooperative, the Commission found that the respective parties had been allocated certain territories by certificates of public convenience and necessity and that there was no reason to change the territorial allocation theretofore made. The Commission further found that when the Power Company supplied electricity to the Government to transmit into the territory allocated to the Cooperative, the Power Company was violating the laws of Arkansas, the certificate of public convenience and necessity theretofore granted to the Cooperative and the contract between the Power Company and the Cooperative. Inasmuch as the Power Company was furnishing electricity to be used in the territory allocated to the Cooperative, the Commission ordered the Power Company to meter the electricity furnished for use in the Cooperative's territory and that the bills between the Cooperative and the Power Company be adjusted so that each might be made whole for services and electricity furnished in their respective areas according to the contract between the Power Company and the Cooperative. The contract between the Cooperative and the Power Company provides that all the electricity sold by the Cooperative in its legally assigned territory shall be purchased from the Power Company and the Power Company shall fur-

nish the Cooperative all of the electricity it needs to supply its legally assigned territory as follows:

> (1) The Company agrees to sell and deliver to the Consumer and the Consumer agrees to purchase and receive from the Company all of the electric power and energy which the Consumer may require for resale to serve the electric requirements of Consumer's electric users in its legally assigned territory during the term of this Agreement (T. 316).

The order of the Commission was appealed by the Power Company to the Circuit Court of Pulaski County, which Court affirmed the order of the Commission. The Power Company appealed these decisions to the Supreme Court of Arkansas, and by a 4 to 3 vote that Court reversed the holdings of the Commission and the Circuit Court of Pulaski County on a purely federal question.

The federal questions presented in this petition were raised in arguments made on the pleadings and testimony before the Commission, the Circuit Court of Pulaski County, and in the briefs submitted and arguments made before the Supreme Court of Arkansas. When the Supreme Court of Arkansas reversed the Commission and the Circuit Court of Pulaski County, a petition for rehearing with brief in support thereof was filed in which these federal questions were argued at length. The Supreme Court of Arkansas held, in effect, that the Government could contract with anyone it chose to furnish electricity to the air base regardless of the contract between the Power Company and the Cooperative, the certificate of public convenience and necessity held by the Cooperative, or any law of Arkansas by virtue of Title 10, United States Code, § 9773, and the Supremacy Clause of the United States Constitution.

ARGUMENT

I.

THE DECISION OF THE COURT BELOW DEPRIVES THE COOPERATIVE OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF U. S. CONST. AMEND. XIV.

When the Cooperative was granted its certificate of public convenience and necessity to provide the area involved with electricity, and in reliance thereon expended its money for facilities to supply the area, its grant became a valuable property right.

Act 342, Ark. Acts of 1937, § 2, as amended by Act 85, Ark. Acts of 1955, § 1, as amended by Act 103, Ark. Acts of 1957, §1 [Ark. Stats. (1947) § 77-1102] provides, in relevant part:

> "(8) * * *; and said Corporation shall not be ousted from service in said rural area or deprived of the right to continue to provide electric service in said rural area subsequent to the granting of a certificate of convenience and necessity by the Arkansas Public Service Commission."

It is common knowledge that certificates of public convenience and necessity are bought, sold, traded, mortgaged, and otherwise dealt with every day. *New State Ice Co. v. Liebmann*, 285 U. S. 262; *Corporation Commission v. Lowe*, 281 U. S. 431; *Wright v. Nagle*, 101 U. S. 791; 23 Am. Jur., Franchises, §§ 5 and 8. Of course, such transactions are subject to the approval of the regulatory body having jurisdiction over such matters for the protection of the public, but in no instance has this Court ever sanctioned the out-

right confiscation of such property. Yet, this is exactly what the Supreme Court of Arkansas has permitted the Power Company to do; namely, to confiscate the property of the Cooperative. Even if it be true that the Government may contract with whom it pleases to supply it with whatever it needs, it may not do so by taking from another a vested right. In this case, under the decision of the court below, the contract for electricity which the Power Company entered into with the Government deprived the Cooperative of its property — its certificate of public convenience and necessity, which it had held for many years, to serve a certain area with electricity and its rights under the contract with the Power Company. This result, obviously, was unintentional on the part of the Government, but the Power Company knew better. Naturally, it made no difference to the Government from whom it received its electricity as the price and service were the same. This fact is demonstrated by the Government's nonintervention in and failure to take the slightest notice of this litigation, even though it was duly notified of the proceeding by the Commission.

The decision of the Supreme Court of Arkansas not only makes a gift of the Cooperative's assigned territory to the Power Company contrary to Act 342, Ark. Acts of 1937, § 2, as amended [Ark. Stats. (1947) § 77-1102], but it sanctions the Power Company's flagrant breach of its aforesaid contract with the Cooperative. For, even if the Government may contract with anyone it chooses, it certainly does not follow that the Power Company may with impunity violate its contract in the process.

Suppose John Doe holds a patent for a particular type of airplane motor. Richard Roe, without license from John Doe, contracts with the Government to manufacture for the Government the exact type of airplane motors covered by the patent. Does the fact that the Government can contract with whom it pleases confer on Richard Roe the right to infringe on John Doe's patent? Of course not. The notion is ridiculous. There is no difference in principle between this example and the present case. The Power Company, by its contract with the Government has "infringed" on the rights of the Cooperative to serve the area, and the court below in its decision has given the Power Company the right to violate its contract with the Cooperative, has given the Power Company the right to violate the quoted statute of Arkansas, and has given the Power Company the right to ignore the certificate of public convenience and necessity granted to it by the Commission contrary to the Due Process Clause of the United States Constitution, Amendment XIV.

If the Cooperative must be ousted from serving its legally assigned territory, then it should be compensated commensurate with its loss. The contract of the Power Company and the Cooperative provides *inter alia*:

> (1) The Company agrees to sell and deliver to the Consumer and the Consumer agrees to purchase and receive from the Company all of the electric power and energy which the Consumer may require for resale to serve the electric requirements of Consumer's

electric users in its legally assigned territory during the term of this agreement * * *." (T. 316)

This contract was in existence at the time of the events forming the basis of this litigation and it is still in effect.

Naturally, this contract contains no express promise by the Power Company that it will not go behind the back of the Cooperative and make a contract with the Government which will rob the Cooperative of the benefits thereof. However, such a promise is as much a part of the contract as it would be if written into it in capital letters. One of the most elementary principles of contract law is that every contract contains an implied covenant that neither party shall do anything which will destroy or injure the other party's right to receive the fruits of the contract. *Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 264, *United States v. Behan*, 110 U. S. 339. Also see generally, 5 Williston on Contracts (Williston & Thompson Ed. 1937) § § 1293, 1293A, 1318; 17 C. J. S., Contracts, § 328.

The court below has ignored the principle stated by these authorities in giving its blessing to the Power Company's breach of the implied condition of its contract with the Cooperative that it should do nothing to prevent the Cooperative from benefitting thereunder. The Cooperative has a right to benefit on behalf of its members from the resale of electricity for use in its legally assigned territory, and the Power Company had no right, irrespective of the powers or immunities of the Government, whether directly or indirectly, to deprive the Cooperative of such benefits.

This is not a case where the Power Company can rely on the supervention of the powers of the Government as an excuse for failing to perform its contract, because the Power Company was under no compulsion, instead it voluntarily agreed, with the Government to serve electricity to the Cooperative's territory. See Williston on Contracts. (Rev. Ed. 1938) § 1939; Restatement, Contracts, § 458, Illustration 2.

The contract rights of the Cooperative are property within the meaning of due process. *Boston Elevated Ry. Co., v. Commonwealth,* 310 Mass. 528, 39 N. E. 2d 87; *Olin Mathieson Chemical Corp. v. Francis,* 134 Colo. 160, 301 P. 2d 139. The guaranty of due process prohibits the taking of one person's property and giving it to another contrary to settled usages and modes of procedure. *Ginsberg v. Lindel,* 107 F. 2d 721. A taking of property is no less lacking in due process when done by the courts rather than some other governmental agency. In *re Cosgrave's Will,* 225 Minn. 448, 31 N. W. 2d 20.

II.

THE DECISION OF THE COURT BELOW DENIES TO THE COOPERATIVE THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY U. S. CONST. AMEND. XIV.

Equal protection of the laws requires that all persons subject to the laws shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities imposed. *State of Louisiana ex rel. Frances v. Resweber*, 329 U. S. 459. It is a guaranty of equality of treatment of all persons in the same place and under like circumstances in pursuit of their lawful businesses. *People v. Montgomery*, 47 Calif. App. 2d 1, 117 P. 2d 437. The rights protected by this guaranty include the right to enjoy, own, and dispose of property. *Shelley v. Kraemer*, 334 U. S. 1.

The guaranty applies not only to legislative and executive action, but to judicial action as well. *Shelley v. Kraemer supra*. Therefore, a discrimination against the Cooperative in favor of the Power Company is as much a denial of equal protection when done by the Supreme Court of Arkansas as it would be if done by the state legislative or executive branch.

There is no evidence whatever in the record of this case which justifies the taking of the property of the Cooperative and bestowing it on the Power Company. Yet,

this is the direct effect of the decision of the court below, and this is a result which the guaranty of equal protection is intended to prevent. Thus, unless it can be made to appear that the Cooperative somehow stands on a legal basis inferior to the Power Company in a way which warrants a difference in treatment, then the decision of the court below violates the guaranty of equal protection of the laws.

III.

THE CONTRACT BETWEEN THE GOVERNMENT AND THE POWER COMPANY MADE THE FURNISHING OF ELECTRICITY TO THE GOVERNMENT BY THE POWER COMPANY SUBJECT TO REGULATION BY THE ARKANSAS PUBLIC SERVICE COMMISSION.

The Secretary of the Air Force is given specific authority to establish air bases under the terms and provisions of Title 10, United States Code, § 9773, and Subsection (f) of that statute provides as follows:

> "At each air base or depot established under this section, the Secretary shall remove or remodel existing structures as necessary; do necessary grading; and provide buildings, *utilities*, communication systems, landing fields and mats, roads, walks, aprons, docks, runways, facilities for the storage and distribution of ammunition, fuel, oil, necessary protection against bombs, and all appurtenances to the foregoing.'" (Italics supplied)

It thus appears that the Secretary of the Air Force is empowered to provide electricity for the Little Rock Air Force Base. In doing so he entered into a contract with the Power Company for that company to supply such electricity. This contract specifically provided that the service furnished thereunder should be subject to regulation by the Arkansas Public Service Commission, as that is the regulatory commission in Arkansas having jurisdiction over such matters. The contract reads, in pertinent part, as follows:

"5. Public Regulation and Change of Rates. (a) Public regulation. Service furnished under this contract shall be subject to *regulation* in the manner and to the extent prescribed by law by any Federal, State or local regulatory commission having jurisdiction . . ." (T. 249) (Italics supplied)

There is no question but that the Government, under the circumstances, may submit to state regulations of the kind involved. See *Stewart & Co. v. Sadrakula*, 309 U. S. 94. Moreover, it is the settled policy of the Government to do so. This is illustrated by Title 50, United States Code, § 491, which is as follows:

"The Secretary of the Air Force is authorized to establish and develop within and without the continental limits of the United States in fulfilling the air defense responsibilities of the Department of the Air Force such land-based air warning and control installations and facilities, by the construction, installation, or equipment of temporary or permanent public works, including buildings, facilities, appurtenances, utilities, and access roads, and to provide for necessary administration and planning therefor, without regard to Section 1339 of Title 10, Section 529 of Title 31, and Section 259 of Title 40, as he may deem necessary in the interest of national security: Provided, that not to exceed $85,500,000 shall be appropriated for the construction of public works authorized by this section.

"The Secretary of the Air Force is authorized to procure communication services required for the semi-automatic ground environment system. No contracts for such services may be for a period of more than ten years from the date communication service are first

furnished under such contract. The aggregate contingent liability of the Government under the termination provisions of all contracts authorized hereunder may not exceed a total of $222,000,000 and no termination payment shall be final until audited and approved by the General Accounting Office which shall have access to such carrier records and accounts as it may deem necessary for the purpose. *In procuring such services, the Secretary of the Air Force shall utilize to the fullest extent practicable the facilities and capabilities of communication common carriers, including rural telephone cooperatives within their respective service areas and for power supply, shall utilize to the fullest extent practicable, the facilities and capabilities of public utilities and rural electric cooperatives within their respective service areas. Negotiations with communication common carriers, including cooperatives, and representation in proceedings involving such carriers before Federal and State regulatory bodies where such negotiations or proceedings involve contracts authorized by this paragraph shall be in accordance with the provisions of Section 481 of Title* 40." (Italics supplied)

The meaning of the language used in the contract between the Government and the Power Company is clear and unambiguous. The caption, "Public Regulation *and* Change of Rates" indicates beyond cavil that the contracting parties understood that the paragraph related to two separate, distinct matters, *i. e.*, (1) regulation, and (2) change of rates. What else could the conjunction "and" import? Why in the name of reason would the parties em-

ploy the term if they did not intend it to mean what every school child apprehends? Why, if the parties intended only to provide for "change of rates," did they employ the term, "public regulation"? Can it be said that the term may be ignored, that it has no meaning, that it is a mere superfluity?

The language of the contract is obviously that of a draftsman for the Government, for it is a standard form, i. e., DA AGO Form R-5629, 1 July 1950. (T. 246) Can it be assumed that the contract was hastily drawn or that the draftsman and/or the Government can be charged with incompetence in the art of draftsmanship? Can the agents of the Government be charged with ignorance of utility regulation? Of course not. The mere asking of these questions compels a negative answer.

The reason for this provision is obvious. The Government wanted this service to be furnished, and if there was any dispute about it, then the dispute should be settled by the regulatory commission having jurisdiction. That is exactly what was done in the case at bar. The Cooperative was entitled to furnish electricity to this area under its certificate of public convenience and necessity granted by the Commission years ago. The Power Company had entered into a contract with the Cooperative to furnish the Cooperative all the electricity it needed to supply the users in its assigned area. Therefore, when the Power Company furnished the Government the electricity to use in this area the Power Company violated not only the certificate of

public convenience and necessity of the Cooperative granted by the Commission, but also violated its contract with the Cooperative to furnish to it the electricity to be used in its area. When this happened the matter was placed before the regulatory commission having jurisdiction of the matter, the Arkansas Public Service Commission, exactly as agreed on in the contract between the Power Company and the Government.

The Arkansas Public Service Commission ruled that the Power Company was selling electricity in the area assigned to the Cooperative in violation of its contract with the Cooperative, the certificate of public convenience and necessity granted to the Cooperative, and in violation of the laws of Arkansas, and that the Commission had jurisdiction over the matter. This was so not only because the Power Company by statute, was subject to its jurisdiction, but also because of the contract provision involved. The Commission sought to regulate the service furnished under this contract so that both the Power Company and the Cooperative would serve their respective areas and the Government would receive uninterrupted service to the air base. The Circuit Court of Pulaski County affirmed this action, but the Supreme Court of Arkansas held that the Commission had no jurisdiction because the Government was a party to the contract with the Power Company. The holding of the Supreme Court of Arkansas is, therefore, in plain violation of the contract provision fixing the jurisdiction as aforesaid.

IV.

EVEN IF THE CONTRACT BETWEEN THE POWER COMPANY AND THE GOVERNMENT HAD NOT SPECIFICALLY PROVIDED THAT THE SERVICE FURNISHED UNDER THE CONTRACT WOULD BE SUBJECT TO REGULATION BY THE ARKANSAS PUBLIC SERVICE COMMISSION, THIS COMMISSION STILL WOULD HAVE HAD SUCH REGULATORY AUTHORITY.

The denial by the Power Company that the Cooperative had any present right or franchise to serve any part of the air base area because such area is now the property of the Government and not subject to any state law or regulation is fallacious even if the contract had not specifically provided that the Commission should have such jurisdiction.

Title 40, United States Code, § 255, provides in relevant part:

> "Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interest therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of jurisdiction, exclusive or partial, not theretofore obtained, over any such lands

> or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

Under this section the notice is required in order to give the United States any jurisdiction, whether exclusive, partial or concurrent, over such land. *Adams v. United States*, 319 U. S. 312.

It is undisputed that the Government has not accepted jurisdiction over the Little Rock Air Force Base as required by the quoted statutory provision. It follows, therefore, that if there is any regulatory power in the premises, it is the power of the state to be exercised through its Commission having the pertinent jurisdiction.

The contract for electricity between the Government and the Power Company was not executed on the air base, and the electricity is not delivered to the Government on the air base. It is delivered to the Government at a point outside the air base, and then transmitted inside the air base by the Government.

In the case of *Penn Dairies v. Milk Control Commission*, 318 U. S. 261, this Court stated:

> "We may assume also that, in the absence of Congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by

federal officers and agencies, of governmental functions. *Ohio v. Thomas*, 173 U. S. 276; *Johnson v. Maryland*, 254 U. S. 51; *Hunt v. United States*, 278 U. S. 96; *Arizona v. California*, 283 U. S. 423. *But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions, Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 524-5; *James v. Dravo Contracting Co.*, 302 U. S. 134, 149; *Buckstaff Co. v. McKinley*, 308 U. S. 358, 362-63 and cases cited; cf. *Susquehanna Co. v. Tax Comm'n.*, 283 U. S. 291, 294; *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, 385-86, *and the mere fact that non-discriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation. Alabama. v King & Boozer*, 314 U. S. 1, 9, and cases cited; *Baltimore & Annapolis R. Co. v. Litchtenberg*, 176 Md. 383, 4 A. 2d 734, sc, *United States v. Baltimore & Annapolis R. Co.*, 308 U. S. 525.

"Here the state regulation imposes no prohibition of the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. See the opinion below, 148 Pa. Super. 270-71. As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of economic burden on the government, for it may be assumed that the regulation if enforceable and enforced will increase the price of milk purchased for consumption in Pennsylvania, unless the government is able

to procure a supply from within the state, see *Baldwin v. Seelig*, 294 U. S. 511. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in *Alabama v. King & Boozer, supra;* or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in *Baltimore & Annapolis R. Co. v. Lichenberg, supra;* or the local building regulations applied to a contractor engaged in constructing a post office building for the Government, sustained in *Stewart & Co. v. Sadrakula*, 309 U. S. 94.

"The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the government itself and government functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the government of the same kind as those imposed on citizens of the United States within the state's borders. And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government from which burdens is to be implied from the Constitution which established the system, see *Graves v. New York ex rel O'Keefe*, 306 U. S. 466, 483, 487.

"Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy. Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional policy does not require. *Reconstruction Finance Corp. v. Menihan Corp.*, 312 U. S. 81, and cases cited; *Colorado Bank v. Bedford*, 310 U. S. 41, 53, and cases cited; cf. *Baltimore National Bank v. Tax Commission*, 297 U. S. 209 . . ." 318 U. S. at 269.

"Hence, in the absence of some evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable, we cannot say that the Pennsylvania milk regulation conflicts with Congressional legislation or policy and must be set aside merely because it increases the price of milk to the government. It would be no more than speculation for us to say that Congress would consider the government's pecuniary interest as a purchaser of milk more important than the interest asserted by Pennsylvania in the stabilization of her milk supply through control of price. Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quire clearly it has not undertaken to make. Furthermore we should be slow to strike down legislation which the state concededly had power to enact, be-

cause of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decisions, while the national government, which has the ultimate power, remains free to remove the burden." 318 U. S. at 275.

In the case at bar, the Government was not a party to the proceeding. No penalty was sought against the Government, nor was t ·re any attempt to order the Government to do anything.

This is a proceeding instituted by the Cooperative against the Power Company to prevent the Power Company from encroaching on territory which had been assigned to the Cooperative by the state regulatory Commission. In its decision, the Commission did not attempt to force the Government into a contract with the Cooperative, but merely enforced the regulations of the Commission and the laws of Arkansas with regard to the rights of the Cooperative and the Power Company and with regard to the contract between them.

The decision of the Commission directed no prohibition against the Government or its officers, and did not disturb or purport to disturb the contract which the Government had with the Power Company to furnish electricity to the air base; nor did it have any effect on the price the Government agreed to pay for electricity. There is no burden, economic or otherwise, placed upon the Government by the decision of the Commission. The Commission was merely applying the law of Arkansas to an Arkansas public utility. The utility is now claiming it is not subject to Arkansas law since it has a contract with the Government — though no part of the contract is performed or to be performed on the air base.

Furthermore, as shown above, Congressional policy in such matters as this is to utilize the facilities of state regulatory bodies as set forth in Title 50, United States Code, § 491 *supra*, and as plainly stated in the contract between the Government and the Power Company.

The Supreme Court of Arkansas in its opinion made the following statement:

> "The real question is whether the Public Service Commission has authority to force the Government to buy electricity from the Co-op., for such is the effect of the order."

That court then proceeded to decide the case exclusively within the limits of that question and ruled that the Arkansas Public Service Commission could not dictate to the Government from whom it should purchase electricity because of the Supremacy Clause of the United States Constitution. There is no quarrel about the law *as applied to the narrow question set forth by the court below* to decide. But, and this is the very crux of this whole case, the question decided by the court below is not the question presented for decision by this litigation. At no time and in no way did the Arkansas Public Service Commission ever attempt to invalidate the contract between the Government and the Power Company. At no time did the Commission ever try to dictate to the Government from whom it should purchase electricity or place any restriction on the Government in any respect concerning its purchase of electricity or anything in connection therewith.

The decision of the Commission concerned the rights of the Power Company and the Cooperative with regard to their respective certificates of public convenience and

necessity, and the contract between the Power Company and the Cooperative with regard to furnishing electricity under the laws of Arkansas.

The case at bar is wholly unlike the situation in the case of *Public Utilities Commission of California v. United States*, 355 U. S. 534. In that case the California commission required any contract for negotiated freight rates between the Government and the carrier to be first approved by the California commission before such contract could be effective.

Nothing like that exists in the case at bar. The Arkansas Public Service Commission did not subject the contract between the Power Company and the Government to its approval as a condition to its validity or effectiveness, nor did it place any requirement upon the Government or the Power Company before they could enter into a contract for electricity.

The case of *Johnson v. Maryland*, 254 U. S. 51, also relied on by the court below is beside the point. In that case the state of Maryland sought to require Johnson, a truck driver for the Post Office Department, to comply with a state statute that he satisfy a state officer that he was competent to perform the work for which he was employed by the Government to do and to pay a fee to the state for permission to do so. This Court in that case held that the Maryland statute required qualifications in addition to those established by the Government and was therefore *invalid* as applied to this employee of the Government. The situation in the case of *Leslie Miller v. Arkansas*, 352 U. S. 187, is totally different from the situation here, for in that case the state of Arkansas attempted to require a contractor of the Government to meet certain

state requirements before he could perform work for the Government in Arkansas. It was held that this would give the state's licensing board a virtual power of review over the Government's determination of "responsibility" and would thus frustrate the expressed Government policy of selecting the lowest responsible bidder.

In the instant case no attempt was made to review, approve, supervise or in any way control or regulate the power of the Government to contract with whom it pleased. The Commission held that the Power Company could not violate its contract with the Cooperative and ignore the laws of Arkansas merely because it had a contract with the Government.

As the Cooperative held a valid certificate of public convenience and necessity under the laws of Arkansas to supply electricity to a certain area and the Cooperative had a valid agreement with the Power Company to furnish the Cooperative the power to serve the area assigned to it by the Arkansas Public Service Commission, the Power Company was simply ordered to keep a separate meter record of electricity supplied to the respective service areas and, in effect, to account to the Cooperative on the basis of the meter record. This, the Commission certainly had the power to do. This, it is believed, the court below would admit — but, unfortunately that court completely missed the point.

CONCLUSION

For the foregoing reasons it is believed that the rights of the petitioner, First Electric Cooperative Corporation, under the United States Constitution, specifically the Due Process and Equal Protection Clauses of the Fourteenth Amendment thereto, have been violated, and that therefore this Court should issue the writ of certiorari as prayed to review the decision of the Supreme Court of Arkansas, and thereupon to reverse it with directions to reinstate the decision of the petitioner Arkansas Public Service Commission as approved by the Circuit Court of Pulaski County, Arkansas.

RESPECTFULLY SUBMITTED,

TOM GENTRY
117 National Old Line Building
Little Rock, Arkansas
Attorney for Petitioners

Dated: March 3, 1960

APPENDIX

ARKANSAS PUBLIC SERVICE COMMISSION

PRESENT:

Lewis M. Robinson: Chairman
J. M. Malone, Commissioner
John R. Thompson, Commissioner

At a session of the Public Service Commission held in its offices in Little Rock, Arkansas, on November 25, 1958.

FIRST ELECTRIC COOPERATIVE CORPORATION)
Complainant)
vs.) Docket No. U-1285
ARKANSAS POWER & LIGHT CO.)
Defendant)

ORDER

This case involves the complaint of the First Electric Cooperative Corporation, hereinafter referred to as "First Electric", complaining against the Arkansas Power & Light Company, hereinafter referred to as the "Power Company serving electricity in a territory which was allocated by this Commission to "Fir— Electric". This allocation of territory has never been changed by the Commission. The service complained of is furnished the United States Government, hereinafter referred to as the "Government", at what is known as the Little Rock Air Force Ba—. Before the Air Force Base was located upon the territory in dispute, the First Electric was serving electricity and the Power Company was serving electricity in their respec-

tive divisions of the territory. Both the First Electric and the Power Company quitclaimed by identical instruments, except as to description of power lines and real estate, all of their property rights in the Air Base territory to the Government at the time of the commencement of the building of the facilities. In the course of the development by the Government of its Air Force Base, it developed what is referred to in the evidence as a housing area. This housing area is located along either side of the line separating the territory of the First Electric and the Power Company as allocated by this Commission.

An issue developed in this matter to the effect that the First Electric, by the quitclaim deed given to the Government, which is Exhibit 3, abandoned and forfeited its Certificate of Convenience and Necessity granted by this Commission to serve in the territory.

The language of this deed is not susceptible of this interpretation and the intention of the parties thereto cannot be so found. Exhibit 7 in this record is the contract referred to in said deed, which deed is referred to above as Exhibit 3. Exhibit 7 consists of a contract between the First Electric and the Government, dated May 20, 1954, and given number DA-03-050-eng-2396.

Section 1 (a) of this contract is as follows:

"(a) The Owner shall furnish all services, labor, materials, tools, and equipment necessary to perform the relocation and or alterations of the following-described facilities and shall relocate such facilities in accordance with the drawings, schedules, or specfications hereto attached and made a part hereof, designated as Exhibit A."

Attached to this contract as part of the Exhibit are drawings, schedules, and specifications referred to in this Section as Exhibit "A". The legend of which explains the lines on the Exhibits and refers to them as:

(1) Existing Power Line.

(2) Existing Power Line to be relocated.

(3) Existing Power Line to be relocated with Conveyance of Real Property Rights to the Government.

(4) Proposed Relocated Power Line.

and other notes which seem to have no bearing on this question. This contract an— Exhibit "A" thereto, clearly corroborates and establishes the clearness of the testimony of witness Crowell for the First Electric, and witness Minnis for the Power Company.

Mr. Crowell, Manager of the First Electric, testified that it was not his intention to abandon First Electric's rights under its certificate of Convenience and Necessity, but that the deed only transferred title to the proper.

Mr. Minnis, a witness for the Power Company, finally concluded his testimony with reference to the deed given by the Power Company, which is identical to that given by First Electric, by saying:

(Tr. 147) "I don't ever intend to give any of Arkansas Power & Light Company's rights away, to be frank with you."

Even if First Electric or the Power Company had intended to abandon its privilege or obligation to serve in the territory as allocated to them respectively, the power

there to do would not not exist under the law. Under the law only the Public Service Commission can allocate territory and it alone can change these allocation orders. Therefore, the contention of sale and abondonment of the territory by either of the parties must fall and the territories as allocated remains the same until changed by the Commission.

Before the development of the housing area by the Government, the Power Company had entered into a contract with the Government to deliver at a certain point in the Power Company's territory, electricity to be used by the Government through the facilities on its own distribution system to serve the Air Force Base. This contract which is Exhibit No. "D" to Exhibit 1, contains a paragraph numbered "Paragraph 5", which provides:

"PUBLIC REGULATION AND CHANGE OF RATES." (a) "Public Regulation. Service furnished under this Contract shall be subject to regulation in the manner and to the extent prescribed by law by any Federal, State, or local regulatory Commission having jurisdiction."

At the time of the development of the housing area, the contract between the Power Company and the Government, herein referred to as Exhibit "D" to Exhibit 1, was amended to provide a specific rate or charge for electricity used in the housing area. The contract as amended provided that a metering point be established at the place where electricity enters the systems serving the housing area, a part of which area being herein in dispute. This provision of the contract clearly separates the Electric power and energy supply to the housing area from the other operation of the Air Force Base, and clearly simpli-

fied the task of this Commission to arrive at a solution to the problem presented to us.

According to the testimony before us, a street or public way separate the territory heretofore allocated to the respective litigants in this cause, and brings us to the question of determining the rights of the respective parties under the law of the State of Arkansas.

Territorial disputes between Electric Cooperatives and the Arkansas Power & Light Company are nothing new to this Commission. The first dispute came to this Commission's attention in the case of Farmers' Electric Cooperative Corporation v. Arkansas Power & Light Company, which will be referred to herein as the "Trimfoot Case". When this case reached the Supreme Court (220 Ark. 652), the Court said: "No doubt the General Assembly failed to foresee the conflict here presented when Act 342 was being considered, else some provisions would have been made for the awkward situation." After the decision of the Court in the "Trimfoot Case", the legislature in 1955 attempted to stabilize the territory allocations by the Commission to the different suppliers of electricity and passed Act No. 85. More difficulty arose after passage of this Act and the legislature in 1957 amended the law again in the passage of Act 103. A pertinent part of this Act is as follows: "SECTION 1. Section Two (2) Paragraph Eight (8) of Act 342 of the Acts of the General Assembly of Arkansas of 1937, as amended by Act 85 of the Acts of the General Assembly of Arkansas of 1955 (Arkansas Statutes 77-1102 (8) is amended to read as follows:

> "Rural Area" means any area not included within the boundaries of any incorporated or unincorporated city, town or village having a population in excess of

twenty-five hundred (2,500) inhabitants, and includes both the farm and non-farm population thereof. The determination of a rural area shall be made as of the time the Arkansas Public Service Commission or predecessor Commission or Department of Public Utilities grants a Certificate of Convenience and Necessity to a Rural Electric Cooperative Corporation organized under said Act 342 of 1937; and said Corporation shall not be ousted from service in said rural area or deprived of the right to continue to provide electric service in said rural area subsequent to the grant of a Certificate of Convenience and Necessity by the Arkansas Public Service Commission."

"SECTION 3. * * * Notwithstanding the provisions of this Act or any other provisions of law, or the terms of any certificate of convenience and necessity, franchise, permit, license or other authority granted to a public utility by the State or a municipality no public utility shall furnish or offer to furnish electric service at retail and not for resale in any area heretofore allocated by the Commission to an electric cooperative corporation pursuant to Section 31 of Act 342 of the Acts of the General Assembly of 1937. (Arkansas Statutes, Section 77-1131)."

"SECTION 4. Nothing in this Act shall be construed to prohibit or prevent a rural electric cooperative corporation and another supplier of electric service from entering into and carrying out a voluntary agreement for the exchange of facilities."

Regardless of the wishes of any of the parties hereto, the law as declared by the legislature must be complied with. It is not within the power of this Commission to abro-

gate the law above quoted and make a ruling to satisfy parties-litigants. If the law as declared in this Act and interpreted in this order should inconvenience the parties hereto, then Section 4 above quoted is ample legislature guidance to an amicable way to eliminate any awkwardness in the situation that has arisen because of allocated territory in the Air Force Base Area.

The Power Company attacks the validity of Act 103 of the 1957 legislature on the grounds that it did not receive a sufficient number of votes for passage. Even though this Act be held by the courts to have failed passage, the law in existence before the passage of this Act required the allocation of territory to the different suppliers of electricity. The territory, as heretofore said in this order, was allocated to the respective parties and they were serving therein. We now see no reason to change this allocation irrespective of Act 103.

Since the contract between the Government and the Power Company provide for metering the power flowing into the housing area, it seems a simple matter to meter at the point where the transmission lines cross the line separating the territory allocated to the respective litigants. If the power is so metered under the contract between the Power Company and the First Electric which is in evidence as Exhibit 12, the Company agrees to sell and deliver to the First Electric such power as the First Electric may require for resale to service the electric requirements of consumers in its legally assigned territory.

The Power Company belabored this record with its theories about the wishes of the Government and the Government's integrated power system at the Air Force Base. By such metering, it seems relatively simple that

there would be no inconvenience to the Government and no material change in its transmission facilities.

IT IS, THEREFORE ORDERED THAT:

The Arkansas Power & Light Company deliver under its contract, through meters along the line separating the territory of the Power Company and the First Electric Co-operative Corporation, power to First Electric to be used in that part of the housing area of the Government's Air Force Base as is necessary to serve the area, and that the bills be adjusted for the same between the said Arkansas Power & Light Company and the First Electric Cooperative Corporation so that each is made whole for services and power furnished in their respective area involved in these proceedings.

This order will become effective on and after 15 days from the date hereof.

BY ORDER OF THE COMMISSION

This 25th day of November, 1958.

(SEAL)

/s/ Tommie Castillow
TOMMIE CASTILLOW, SECRETARY

/s/ Lewis M. Robinson
LEWIS M. ROBINSON, CHAIRMAN

/s/ J. M. Malone
J. M. MALONE, COMMISSIONER

/s/ John R. Thompson
JOHN R. THOMPSON, COMMISSIONER

PULASKI CIRCUIT COURT, THIRD DIVISION

MARCH TERM, 1959

MONDAY, MARCH 30TH, 1959.

Arkansas Power & Light Company, ... Petitioner,

Vs. 46505

Arkansas Public Service Commission and
First Electric Cooperative Corporation, ... Respondents.

JUDGMENT

On this day comes on for consideration, by the Court the petition of the Arkansas Power & Light Company to review and vacate the order of the Arkansas Public Service Commission entered on the 25th day of November, 1958, in the proceeding before the said Commission designated as Docket No. U-1285, the said cause having been presented to this court upon the said petition to review and vacate, a certified copy of the record of the proceedings before the said Commission and briefs presented to the Court by the petitioner and the First Electric Cooperative Corporation; and the Court being well and sufficiently advised as to all matters of law and fact herein doth find that the said order of the Commission was issued in regular pursuance of its authority and that said order does not violate any rights of the petitioner under the Constitution of the United States or the State of Arkansas and that the Commission's order

is supported by substantial evidence, free from fraud and not arbitrary.

IT IS, THEREFORE, BY THE COURT CONSIDERED, ORDERED AND ADJUDGED that the Petition to review and Vacate the Order of the Arkansas Public Service Commission dated November 25th, 1958, be and the same is hereby dismissed.

This judgment made and entered on the 30 day of March, 1959.

(signed) J. Mitchell Cockrill
Circuit Judge

SUPREME COURT OF ARKANSAS

No. 1940

ARKANSAS POWER & LIGHT COMPANY ... Appellant.

—V—

ARKANSAS PUBLIC SERVICE COMMISSION, et al ... Appellees

Opinion Delivered — November 2, 1959

Appeal from Pulaski Circuit Court, Third Division

Reversed

Chief Justice Harris and Justices Ward and Johnson dissent

SAM ROBINSON, Associate Justice

The United States Government purchased several thousand acres in Pulaski County to be used as an Air Force Base. Prior to this purchase by the Government, the right to sell electricity in a portion of the area had been allocated to the First Electric Cooperative Corporation, hereinafter called the Co-op, and the right to sell electricity in the other portion had been allocated to the Arkansas Power & Light Company, hereinafter called the Power Company. After the Government acquired the land it required the Co-op and the Power Company to remove all their electrical equipment of every kind and description from the area and paid them for doing so. Subsequently the Government constructed on the property an electrical distribution system that it owns and operates. In 1954 the Government contracted with the Power Company for the purchase by the Government of electricity to be used at the

Air Base. The electricity is supplied by the Power Company at its substation located in an area previously allocated to it by the Public Service Commission and adjacent to the Air Base property.

In 1957 the Government began construction of several hundred housing units for Air Force personnel. Some of these houses are located in the area formerly supplied with electricity by the Co-op before the Air Base was established, and part were constructed in the area which had been supplied by the Power Company under the allotment made before acquisition of the land by the Government. The Government uses electricity obtained under a 1957 supplemental contract with the Power Company to supply all the housing units within the Air Base area.

This litigation was started when the Co-op filed a complaint with the Arkansas Public Service Commission asking that the Power Company be ordered to cease and desist from furnishing electric power to the Government to be used in supplying the Government housing units located in that part of the Air Force Base which had been serviced by the Co-op before acquisition of the property by the Government. Of course, the effect of such an order would be to enable the Co-op to supply electricity to the area mentioned. The Commission in effect granted the petition but attempted to simplify the matter by ordering the Power Company to meter separately the electricity going into that part of the housing units located on property formerly supplied by the Co-op and to settle with the Co-op by charging it at the rate it pays the Power Company for electricity and giving it credit for the price received from the Government. A meter or meters would have to be installed on Government property and made a part of the

Government distribution system. Such an arrangement would give the Co-op a handsome profit without any investment whatever on its part. It was shown that the Power Company has spent several hundred thousand dollars to enable it to supply electricity to the Air Base. The circuit court affirmed the order of the Commission.

The real question is whether the Public Service Commission has authority to force the Government to buy electricity from the Co-op, for such is the effect of the order. The Government wanted to construct in the area its own electricial distribution system. The Power Company and the Co-op were required to remove their equipment from the property. In contracting with the Power Company for electricity, the Government required the Company to provide certain facilities to guarantee as nearly as possible an uninterrupted supply of electricity. The Government then tied its facilities in to those constructed by the Power Company. It was shown that the Government initiated the negotiations with the Power Company to purchase electricity. A fair abstract of the testimony of Mr. H. F. Minnis, Vice-President of the Power Company, on this point, as prepared by appellant, is as follows:

"The negotiations first started on February 5, 1953 when the Corps of Engineers came to us about relocation or removal of our existing facilities in the Air Base area and the possible relocation of our 115 kv transmission line. That was all consummated by the Corps of Engineers, but later on February 25, 1953 Colonel Ben Harvey of the Corps of Engineers asked our Company for a conference with reference to a power supply. The government solicited us to furnish the power supply and set a tenative date for a conference on October 8, 1953. On that date we had a

meeting and went into all requirements upon the power supply. In these negotiations the government laid down specifications as to the material and kind of power it would need to serve the Air Base and the type of load it would be. They requested a source of power from our transmission system and that the sub-station be located adjacent to the Air Base property but not on it. They requested that the service be metered and the point of delivery be at the south boundary line of the Air Force property so that from that location the Air Force would build its entire distribution system to serve the requirements of the Air Base. . . .

"We built a 115 kv transmission line adjacent to the south border of the Air Base property fed directly from our 115 kv transmission system, that is energized from two ways so that they could have continuous service so far as primary distribution voltage was concerned. In order to do that we built a new transmission line from Little Rock to Jacksonville completely shielded up to this sub-station site and put in an oil circuit breaker that would protect the rest of the line towards Newport so if there was a fault beyond Jacksonville to Newport it would not affect the Air Base. The contract was reduced to writing as to the electric service specifications in which the Government stated the amount of capacity and energy they wanted and the delivery voltage. The contract provides that the premises to be served is the Little Rock Air Force Base. The electric service specifications are on page 10 of the contract, showing 7500 kilowatts estimated maximum demand and 32,400 kilowatts estimated annual consumption. It provides that the point of delivery of service should be at the Base boundary as shown on Exhibit D to the contract. Exhibit A to the contract, or the specifications of the sub-

station we were required to furnish the Government, consists of a schematic diagram which shows exactly how to build the station and shows the point of delivery and that the government would have as near a continuous source of supply as possible. From the point of delivery to the south boundary indicated on Exhibit A to the contract, the government built their entire distribution system to serve the whole Air Base. On the map introduced in evidence the sub-station site is shown in Section 18 adjacent to the south boundary of the Base and is shown as a small green square south of the Air Base boundary. The 115 kv line is fed from two ends and originated at the Dixie sub-station at one end and the Newport sub-station at the other. We built an entirely new line from the Dixie sub-station to the Air Base. I don't know the exact cost of the construction, but I judge it is approximately ten miles and costs about $25,000 a mile so it is approximately $250,000. It is a heavy line, big conductor, completely shielded.

"Our sub-station was built according to government requirements, and the line was built according to government requirements set forth in the contract. The government gets transmission line connection at our sub-station right at the terminus of the new line which we built from the sub-station. On towards Newport the old line goes in and that is the reason they insisted we put an oil circuit breaker there so if there is a fault between the sub-station and Newport it would not interrupt service to the Air Base. All of this was done to meet requirements of the United States. Cost of the sub-station was negotiated, and the government paid approximately three-fourths of it and the power company paid the other one-fourth less any salvage we might get if the government discontinues ser-

vice. It resolves itself down into a connection charge of $85,860, and this is detailed in the contract.

"Under the terms of our agreement with the government they will get back the connection charge in electricity as we give them credit for ten per cent of the monthly billing until they recover their money. I am familiar with the government's distribution system within the Base and have been over it. From the point of delivery at our sub-station the government built two circuits of heavy conductors, about 500,000 circular mills aluminum to a switching station, which is about three-fourths of a mile northwest from the sub-station in the Air Base. From there it goes into the switching station, and they installed three circuit breakers. From these circuit breakers go three different 13 kv lines that radiate out over all the Air Base property on which are installed air break switches which permit the government to sectionalize any part of these feeder circuits and operate them as a loop. Where they have a small lateral over one of these big feeder circuits they have installed fuse switches so if there is a fault on one of the small laterals it does not interfere with service from the main feeder and if there is a fault on the feeder circuit they can sectionalize it quickly and feed the rest of the area from the other circuits. To protect it from lightning, which is quite a problem, they shielded their feeder circuit just as we shielded our 115 kv line. Their whole grid system of distribution voltage, except for some laterals, which are not complete, is shielded. The government's entire system at the Air Base is what is ordinarily known as a loop system, and you can get service three ways from almost any portion of it. This was done to preserve the continuity of service as far as is possible."

Although it does not appear that the United States has acquired jurisdiction pursuant to Title 40, §255, USCA, in the circumstances of this case the Power Company cannot be prevented from selling electricity to the Government for use over the entire area of the Air Base. The Air Base is a facility established for a national purpose. In the case of *Public Utilities Commission of California v. U. S.*, 355 U. S. 534, 2 L. ed. 2d 470, 78 S. Ct. 446, the principle was reiterated by the United States Supreme Court that state laws or their administrators cannot interfere with the carrying out of a national purpose. There the court held invalid a state statute authorizing the state commission to approve rates charged by common carriers to the United States as being an unlawful interference with the activities of the Federal Government. If a state cannot regulate the rates a utility charges the Federal Government, then it is hard to understand how the commission can enjoin the utility company from furnishing all the service the Government requires.

In 1958 an issue almost identical with the one in the case at bar was before the North Dakota Public Service Commission. *Re Souris River Telephone Mutual Aid Corp.*, 24 PUR 3d 84. There the question was whether the public service commission should revoke a certificate of convenience and necessity theretofore granted to the Northwestern Bell Telephone Company and grant such a certificate to the Souris River Telephone Mutual Aid Corporation. The commission held that it had no authority to dictate to the Government as to the persons or corporations

with which it should contract for utility facilities. In that case it was said: "The thing to be remembered is that the responsibility for this decision [the obtaining of utility facilities] is with the Secretary of the Air Force and no one else. If it was to be said that a company not having an established service area must obtain a certificate from the commission before it can enter into a contract with the secretary, then it follows that the commission would also have the power to deny the company such authority and thus directly interfere with the discretion rested by Congress in the federal officer. The federal statute does not require that the company with whom the secretary desires to contract also obtain a certificate of authority from a state commission and if Congress had intended such to be the case it would have so stated." The Commission was referring to USCA, Title 50, §491, but Title 10, §9773 is equally applicable. It provides: "The Secretary of the Air Force shall determine the sites of such additional permanent air bases and depots in all strategic areas of the United States and the Territories, Commonwealths, possessions, and holdings *as he considers necessary*. He shall also determine when the enlargement of existing air bases and depots is necessary and for the effective peacetime training of the Air Force. . . . At each Air Base or depot established under this section the Secretary shall remove or remodel existing structures as necessary; do necessary grading; and provide buildings, *utilities*, communication systems, landing fields and mats, roads, walks, aprons, docks, runways, facilities for the storage and distribution of ammunition,

fuel, oil, necessary protection against bombs, and all appurtenances to the foregoing. . . ." (Emphasis supplied)

In *Johnson v. Maryland*, 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16, Mr. Justice Holmes quoted from *Osborn v. Bank of U. S.*, 9 Wheat. 738, 867, 6 L. ed. 204, as follows: "Can a contractor, for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative."

And in the Osborn case the court goes on to say: "It is true, that the property of the contractor may be taxed, as the property of other citizens . . . But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under state control." Likewise, in the case at bar the Public Service Commission cannot designate the utility company from whom the Government must purchase electricity, nor can the Commission dictate the area of Government owned property in which the Government must use the electricity it has purchased.

The Co-op argues, also, that under the terms of the contract between the Power Company and the Government, regulations adopted by the Public Service Commission shall prevail. The contract provision in question is as follows:

"5. PUBLIC REGULATION AND CHANGE OF RATES. (a) Public regulation. Service furnished under

this contract shall be subject to regulation in the manner and to the extent prescribed by law by any Federal, State, or local regulatory commission having jurisdiction. If during the term of this contract the public regulatory commission having jurisdiction receives for file in authorized manner rates that are higher or rates that are lower than these stipulated herein for like conditions of service, the Contractor agrees to continue to furnish service as stipulated in this contract and the Government agrees to pay for such service at the higher or lower rates from and after the date when such rates are made effective."

Disregarding the question of whether the Co-op can properly invoke a provision of the contract between the Government and the Power Company, the above quoted provision of the contract appears to apply only to rates. But in any event, it is not subject to the construction that the Government cannot do the principal thing it was seeking to do, and that was to buy electricity from the Power Company for use on the entire Air Base.

Reversed, with directions to dismiss the complaint.

SUPREME COURT OF ARKANSAS

No. 1940

ARKANSAS POWER & LIGHT COMPANY ... Appellant

v.

ARKANSAS PUBLIC SERVICE COMMISSION, et al ..... Appellees

Opinion Delivered — November 2, 1959

APPEAL FROM PULASKI CIRCUIT COURT, THIRD DIVISION

DISSENT

PAUL WARD, Associate Justice

There is nothing in the record in this case to show that the United States Government cared which Company furnished its electricity, but, as pointed out in another dissent, the record does show that it was willing to abide by State regulations. This, I submit, is the reasonable and sensible attitude that the Government should have taken — and did in fact take.

It is apparent to me that this case is before us now in its present status simply because appellant contracted with the Government before the question here involved could be raised. Putting it another way, it appears that appellant never disclosed to the Government that any question of assignment of territory might be involved. On

this point consider the testimony of appellant's Vice-President:

"Q. The question that I asked you is this: Did you tell the government at the time that they contacted you concerning the power for the Air Base that you did not have a Certificate of Public Convenience and Necessity to serve the entire Air Base?

A. In the negotiation the Government gave us the point of delivery they wanted. We looked at that and saw that it was in an area that was allocated to the Arkansas Power and Light.

Q. Now then, answer my question. Did you tell them the First Electric Cooperative had a Certificate of Public Convenience and Necessity to serve the area?

A. Did I tell them?

Q. Yes, sir.

A. No, sir, I did not.

. . .

Q. Do you know of your own knowledge, Mr. Minnis, whether or not the Contracting Officer had any idea who had the right to serve that territory under a Certificate of Convenience and Necessity from this Commission?

A. I think I know the Contracting Officer had the right to sell the service at the point he sold it and I think

he knew the U. S. Government can do what they dern please with it after they get it.

Q. That is not the question I asked you and I am going to stay here all day until I get an answer to my question if the Commission will permit me. My question was: You did not know whether or not the Contracting Officer knew that the First Electric Cooperative had a right to serve a part of that territory at that time when you entered into the contract, do you?

A. I don't think these Contracting Officers are dumb. We have dealt with them a lot of times and they knew all about their business in a big way and they came in with their requirements and we met them on that basis.

Q. And you did not tell them that you did not have a Certificate of Necessity to serve all the territory in the Air Base?

A. We have a certificate to serve the Base at the place we did serve it and he knows that.

Q. But you did not tell him that you did not have a Certificate of Public Convenience and Necessity to serve all of the Air Base, did you?

A. It was not necessary from our standpoint.

Q. You did not do it whether it was necessary or not, did you? Why are you so reluctant to answer?

A. Because we did not try to tell the Government how to run their business.

Q. Just answer my question, did you or did you not?

A. They asked us for a point of delivery and it was at a place we had a right to serve. We sold it there and they took it from there.

Q. You did not tell them?

A. I told them just exactly what I told you.

Q. And that was no, I believe you said.

A. Sir?

Q. That was no.

A. I said we had a right to serve at the place we did serve and they took it from there."

SUPREME COURT OF ARKANSAS

No. 1940

ARKANSAS POWER & LIGHT COMPANY, .. Appellant,

V.

ARKANSAS PUBLIC SERVICE
COMMISSION, et al., ... Appellees

OPINION DELIVERED

Appeal from Pulaski Circuit Court,

Third Division.

DISSENTING OPINION.

JIM JOHNSON, Associate Justice

In respectfully dissenting to the majority opinion, I want to state at the outset that I do not disagree with any of the cases cited therein. The cases, as I view them, simply do not touch top, side nor bottom the issues involved in this lawsuit. This dissent is based wholly upon the clear language of Section 5 of the Contract between the United States and the Arkansas Power & Light Company. This section is headed: "Public Regulation and Change of Rates." The title alone shows that two subjects are covered in Section 5: (1) Public Regulation; and (2) Change of Rates. The first sentence in Section 5 is as follows:

> "Service furnished under this contract shall be subject to regulation in the manner and to the extent pre-

scribed by law by any Federal, *State*, or local regulatory commission having jurisdiction." (Emphasis Supplied).

I can place only one interpretation upon this sentence and that is the United States voluntarily submitted to the regulations of the commission having jurisdiction. In reading Section 5 and the contract in its entirety I am unable to find one word indicating that it was the intention of the United States to limit the jurisdiction to which it voluntarily submitted to rates alone. Section 5, as I see it, (1) submits the United States to general public utility regulation, including (2) regulation of rates.

It must be conceded that under our law the Public Service Commission is the "regulatory commission having jurisdiction." This being true, I can see no good reason for abandoning our well settled rule that we only review the following four questions on appeals from the Public Service Commission:

1. Is the Commission's order supported by substantial evidence?
2. Is the Commission's order free from fraud?
3. Is the Commission's order arbitrary?
4. Does the order of the Commission violate any right of the appellant under the United States or State Constitutions? See: *Inc. Town of Emerson v. Ark. Public Service Commission*, 227 Ark. 20, 295 S. W. 2d 778.

Nowhere in the record is it seriously indicated that any of the above questions could be answered in the affirmative. In fact, I am convinced that the Commission's Order is the only logical conclusion that could possibly be reached in this case under the circumstances. The United States indicated its recognition of the clear terms of its contract by its failure to intervene in this lawsuit. The majority opinion, in effect, is saying that this does not matter; Arkansas Power & Light Company is entitled to all the privileges and immunities of the United States Government, yea even entitled to rights that the Government itself is not claiming. The states of this Union have already, voluntarily or otherwise, relinquished too many rights to the central Government without our forcing upon a contractor with the Government rights which the Government has voluntarily relinquished to our State utility regulatory authority.

For the reasons stated above, I respectfully dissent.

IN THE SUPREME COURT OF ARKANSAS

ARKANSAS POWER & LIGHT COMPANY ..... APPELLANT

V. No. 1940

ARKANSAS PUBLIC SERVICE COMMISSION, et al., ... APPELLEES

PETITION FOR REHEARING

Come the appellees and move the court that they be granted a rehearing in the above styled action, and for cause, state:

I

The court's decision deprives the First Electric Cooperative of its property without due process of law in violation of U. S. Const. Amend. XIV, § 1, and Ark. Const. Art. 11, § 8.

II

The court's decision denies to the First Electric Cooperative Corporation the equal protection of the laws guaranteed by U. S. Const. Amend. XIV, §1, and Ark. Const. Art. II, § 3.

III

The court erred in construing the contract between the United States and the Arkansas Power & Light Company to mean that the United States had not submitted to the regulations of the Arkansas Public Service Commission.

IV

The court erred in assuming that the regulations of the Arkansas Public Service Commission would necessarily interfere with a federal function when, in fact, the United

States has evidenced its complete indifference in this connection by its failure to intervene or in any other way to show an interest in this proceeding.

V

The court erred in failing to give weight to the fact that the United States apparently did not know of the existence of the contract between the First Electric Cooperative Corporation and the Arkansas Power & Light Company and the rights of the First Electric Cooperative Corporation under its certificate of public convenience and necessity when the United States contracted with the Arkansas Power & Light Company.

WHEREFORE, Appellee pray that a rehearing be granted, and that the judgment of the trial court be affirmed.

/s/ TOM GENTRY
TOM GENTRY
Attorney for Appellees
117 Nat'l Old Line Bldg.
Little Rock, Arkansas

CERTIFICATE

I, Tom Gentry, the attorney for appellees do certify that I have carefully read and considered the opinion of the court herein; that I verily believe that the court has committed error as above set forth in the petition for rehearing; that said Petition is meritorious, and is not filed for the purpose of delay, but in order that justice may be served. A copy of this petition has been served on opposing counsel.

/s/ Tom Gentry
TOM GENTRY

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Const. Amend. XIV, §1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U. S. Const. Art. VI:

> "1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the confederation.
>
> "2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.
>
> "3. The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States."

UNITED STATES STATUTORY PROVISIONS INVOLVED

Title 10, United States Code, §9773:

"(a) The Secretary of the Air Force shall determine the sites of such additional permanent air bases and depots in all strategic areas of the United States and the Territories, Commonwealths, possessions, and holdings as he considers necessary. He shall determine when the enlargement of existing air bases and depots is necessary for the effective peacetime training of the Air Force.

"(b) In determining the sites of new air bases and depots, the Secretary shall consider the following regions for the purposes indicated —

(1) the Atlantic northeast, for training in cold weather and in fog;

(2) the Atlantic southeast and Caribbean areas, for training in long-range operations, especially those incident to reinforcing the defenses of the Panama Canal;

(3) the southeastern United States, to provide a depot necessary to maintain the Air Force;

(4) the Pacific northwest, to establish and maintain air communication with Alaska;

(5) Alaska, for training under conditions of extreme cold;

(6) the Rocky Mountain area, to provide a depot necessary to maintain the Air Force, and for training in operations from fields in high altitudes; and

(7) other regions, for the establishment of intermediate air bases to provide for transcontinental movements of the Air Force for maneuvers.

"(c) In selecting sites for air bases and depots covered by this section and in determining the alteration or enlargement of existing air bases or depots, the Secretary shall consider the need —

(1) to form the nucleus for concentration of Air Force units in time of war;

(2) to permit, in time of peace, training and effective planning in each strategic area for the use and expansion of commercial, municipal, and private flying installations in time of war;

(3) to locate, in each strategic area in which it is considered necessary, adequate storage facilities for munitions and other articles necessary to facilitate the movement, concentration, maintenance, and operation of the Air Force; and

(4) to afford the maximum warning against surprise attack by enemy aircraft upon aviation of the United States and its necessary installations consistent with maintaining, in connection with existing or contemplated landing fields, the full power of the Air Force for operations necessary in the defense of the United States, and in the defense and reinforcement of the Territories, Commonwealths, possessions, and holdings.

"(d) In carrying out this section, the Secretary, on behalf of the United States, may acquire title, in fee simple and free of encumbrance, to any land that he considers necessary —

(1) by accepting title without cost to the United States;

(2) by exchanging military reservations or parts thereof for that land, upon the written approval of the President; or

(3) by purchase or condemnation, if acquisition by gift or exchange is impracticable.

"(e) The Secretary may, by purchase, gift, lease, or otherwise, acquire at desired locations bombing and machine gun ranges necessary for practice by, and the training of, tactical units.

"(f) At each air base or depot established under this section, the Secretary shall remove or remodel existing structures as necessary; do necessary grading; and provide buildings, utilities, communication systems, landing fields and mats, roads, walks, aprons, docks, runways, facilities for the storage and distribution of ammunition, fuel, oil, necessary protection against bombs, and all appurtenances to the foregoing.

"(g) The Secretary may direct the transportation of personnel, and the purchase, renovation, and transportation of material, that he considers necessary to carry out this section."

Title 28, United States Code, §1257 (3):

"By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set

up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Title 40, United States Code, §255:

"No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy yard, customhouse, lighthouse, or other public building of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title.

"Notwithstanding the provisions of this or any other law, whenever the average value of any lands or interests in land to be acquired by or on behalf of the United States under a single option or contract of sale does not exceed $10 per acre (hereinafter referred to as "low-value lands"), the title may be accepted subject to such infirmities as, in the opinion of the Attorney General, may, without jeopardizing the interests of the United States, be left for removal by condemnation or other appropriate proceedings, if and when necessary: Provided, That the total value of any lands or interests to be acquired under a single option or contract of sale subject to an infirmity does not exceed $3,500. No public money shall hereafter be expended for the acquisition of such low-value lands or interests in land by or on behalf of the United States for any purpose until the written opinion of the Attorney General has been had approving the title subject, if expedient, to infirmities as herein provided. However, no money in excess of $2,500 shall be expended for the construction of buildings, works, or other improvements (except

roads, trails, and fire-protection improvements) on any site, tract, or parcel of land the title to which is subject to infirmities, until the written opinion of the Attorney General in favor of the validity of the title has been had as in the case of other lands. For the purpose of this section, values of lands and interests in land shall be determined by the consideration paid or to be paid.

"The Attorney General is authorized to approve the title to easements or rights-of-way to be acquired by or on behalf of the United States, subject to such infirmities as, in his opinion, will not jeopardize the interests of the United States.

"Nothing in this section shall be construed to limit the authority now or hereafter delegated to any officer in exercising the power of eminent domain for or on behalf of the United States, to take title to or possession of or to expend money for or upon any land or interest in land, or to expend money as security for an ultimate award in advance of final judgment in any proceedings to determine just compensation; nor shall this section be construed to preclude any acquiring agency from expending money for the erection of any preliminary and temporary structure upon any land.

"The head or other authorized officer of any department, independent establishment, or agency, shall procure any evidence of title which the Attorney Gen-

eral may deem necessary, and the expenses of procurement, except where otherwise authorized by law or provided by contract, may be paid out of the appropriations for the acquisition of land or out of the appropriations made for the contingencies of the acquiring department, independent establishment, or agency.

"The Attorney General may, in his discretion, base any opinion as to title required either by this section or any other law upon either or both of the following: Certificates of title of title companies or such evidence of title as he may deem satisfactory.

"The foregoing provisions of this section shall not be construed to affect in any manner any existing provisions of law which are applicable to the acquisition of lands or interests in land by the Tennessee Valley Authority; and nothing in this section shall be construed to affect in any manner any authority which the Secretary of the Army, the Chief of Engineers, or the Secretary of the Interior have under the provisions of law in force on October 9, 1940, with respect to the approval by them of title to land or interest in land acquired by the Department of the Army or the Department of the Interior, as the case may be. Nor shall the foregoing provisions of this section, or the provisions of any other law be construed to require any opinion of the Attorney General in connection with the acquisition or improvement of easements and rights-of-way for military or naval purposes; or for

the acquisition or improvement of easements and right-of-way by the Department of Agriculture for forest and other conservation purposes where the cost of any such easement of right-of-way acquired under a single instrument of conveyance and the cost of any improvement thereon does not exceed $2,500, and the Attorney General may, in his discretion, waive the requirement for his opinion in connection with the acquisition or improvement of easements and rights-of-way for other purposes when, in his opinion, such waiver will not jeopardize the interests of the United States.

"Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands

are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

Title 50, United States Code, §491:

"The Secretary of the Air Force is authorized to establish and develop within and without the continental limits of the United States in fulfilling the air defense responsibilities of the Department of the Air Force such land-based air warning and control installations and facilities by the construction, installation, or equipment of temporary or permanent public works, including buildings, facilities, appurtenances, utilities, and access roads, and to provide for necessary administration and planning therefor, without regard to section 1339 of Title 10, section 529 of Title 31, and section 259 of Title 40, as he may deem necessary in the interest of national security: Provided, That not to exceed $85,500,000 shall be appropriated for the construction of public works authorized by this section.

"The Secretary of the Air Force is authorized to procure communication services required for the semi-automatic ground environment system. No contract for such services may be for a period of more than ten years from the date communication services are first furnished under such contract. The aggregate contingent liability of the Government under the termina-

tion provisions of all contracts authorized hereunder may not exceed a total of $222,000,000 and no termination payment shall be final until audited and approved by the General Accounting Office which shall have access to such carrier records and accounts as it may deem necessary for the purpose. In procuring such services, the Secretary of the Air Force shall utilize to the fullest extent practicable the facilities and capabilities of communication common carriers, including rural telephone cooperatives, within their respective service areas and for power supply, shall utilize to the fullest extent practicable, the facilities and capabilities of public utilities and rural electric cooperatives within their respective service areas. Negotiations with communication carriers, including cooperatives, and representation in proceedings involving such carriers before Federal and State regulatory bodies where such negotiations or proceedings involve contracts authorized by this paragraph shall be in accordance with the provisions of section 481 of Title 40."

ARKANSAS STATUTORY PROVISIONS INVOLVED

Act 571, Ark. Acts of 1919, §5, as amended by Act 124, Ark. Acts of 1921, §3 [Ark. Stats. (1947) §73-115 (a)]:

"The jurisdiction of the [Arkansas Public Service Commission and the Arkansas Commerce] Commission shall extend to and include all matters pertaining to the regulation and operation of —

(a) All

Common carriers,

Railroads,

Express companies,

Car companies,

Freight lines,

Toll bridges,

Ferries,

Steamboats,

Street railroads,

Telegraph companies,

Telephone companies,

Pipeline companies for transportation of oil, gas and water,

Gas companies,

Electric lighting companies, and other companies furnishing gas or electricity for light, heat, or power purposes,

Hydro-electric companies for the generation and for transmission of light, heat or power,

Water companies, furnishing water within municipalities for municipal, domestic or industrial use.

"Provided, however, that nothing herein shall vest said commission with jurisdiction as to any rate, charge, rule, regulation, order, hearing, investigation, or other matter pertaining to the operation within the limits of any municipality of any street railroad, telephone company, gas company, pipe line company for transportation of oil, gas or water, electrical company, water company, hydro-electric company or other company operating a public utility or furnishing public service as to which jurisdiction may be elsewhere conferred in this act upon any municipal council or city commission; notwithstanding, however, the jurisdiction of the municipality as to the above matters within the limits of such municipality, the said Arkansas Railroad Commission [Arkansas Public Service Commission] shall have and is hereby delegated the authority and duty to require all utility companies now furnishing public service within the limits of any municipality to furnish and continue furnishing such service to such municipality, though the right of regulation of such utility as to rates and all other matters within such municipality is herein elsewhere conferred upon the municipal councils or city commissions subject to right of appeal to the courts.

"Provided, further, that nothing herein shall vest said commission with jurisdiction as to any improvement district or municipality furnishing gas or electricity for any purpose.

"And for the purpose of this act, and in the construction of this act, every person, firm, association, company, partnership or corporation or other organizations engaged in the operation of any public utility above indicated, shall be deemed to be a company within the meaning of this act."

Act 342, Ark. Acts of 1937, §2, as amended by Act 85, Ark. Acts of 1955, §1, as amended by Act 103, Ark. Acts of 1957, §1 [Ark. Stats. (1947) §77-1102]:

"In this act, unless the context otherwise requires:

"(1) 'Corporation' means a corporation organized pursuant to the provisions of this act.

"(2) 'Board' means a board of directors of a corporation organized under this act.

"(3) 'Member' means the incorporators of a corporation and each person thereafter lawfully admitted to membership therein.

"(4) 'Federal Agency' includes the United States of America and any department, administration, commission, board, bureau, office, establishment, agency, authority, or instrumentality of the United States of America heretofore or hereafter created.

"(5) 'Person' includes any natural person, firm, association, corporation, business trust, partnership, Federal agency, State or political subdivision thereof or any body politic.

"(6) 'Acquire' means and includes construct, acquire by purchase, lease, devise, gift, or other mode of acquisition.

"(7) 'Obligations' include bonds, notes, debentures, interim certificates or receipts, and all other evidences of indebtedness issued by a corporation.

"(8) 'Rural Area' means any area not included within the boundaries of any incorporated or unincorporated city, town, or village having a population in excess of twenty-five hundred (2,500) inhabitants, and includes both the farm and nonfarm population thereof. The determination of a rural area shall be made as of the time the Arkansas Public Service Commission or predecessor Commission or Department of Public Utilities grants a certificate of convenience and necessity to a Rural Electric Cooperative Corporation organized under said Act 342 of 1937, and said Corporation shall not be ousted from service in said rural area or deprived of the right to continue to provide electric service in said rural area subsequent to the granting of a certificate of convenience and necessity by the Arkansas Public Service Commission."

Act 342, Ark. Acts of 1937, §31, as amended by Act 85, Ark. Acts of 1955, §2, as amended by Act 103, Ark. Acts of 1957, §2 [Ark. Stats. (1947) §77-1131]:

"All corporations organized under this act shall be exempt in any and all respects from the jurisdiction and control of the Public Service Commission of this State, except as herein provided. Said corporations shall secure from the Public Service Commission, before construction or operation is begun, a certificate of convenience and necessity for the construction or operation of any equipment or facilities for supplying electric service in rural areas. Said corporations shall pay a fee of twenty-five ($25.00) dollars to the Public

Service Commission for each certificate of convenience and necessity granted said corporations. This fee is collected for the service rendered in investigating and granting a certificate of convenience and necessity.

"The inclusion by incorporation, annexation or otherwise of any portion of a rural area, as defined in this act, within the limits of an incorporated or unincorporated city, town or village, regardless of its population, shall not in any respect impair or affect the rights of said corporations under their certificates of convenience and necessity to continue and extend electric service in such included areas; and notwithstanding any other provisions of law, said corporations shall be entitled to continue and extend service therein under the same terms and conditions as those contained in the franchise or indeterminate permit of any other supplier of electric service in said city, town or village the same as though it was a party to such franchise or indeterminate permit, and provided that a Rural Electric Cooperative which serves an area within the limits of any municipality under the terms of this act shall as to such area be subject in all respects to the jurisdiction of the Public Service Commission to the same extent and in the same manner as a commercial electric utility serving within such municipality; and any such city, town or village shall have the same authority to impose taxes, charges or fees in respect of the business of a corporation conducted within the corporate limits of such city, town or village, as it has in respect of business conducted by other suppliers of electric service; and provided further that where a corporation continues and extends its electric service in

areas which are so included within the limits of such a city, town or village which is also receiving electric service at retail from another supplier of such service, the retail rates charged by a corporation to its various classes of consumers shall be comparable with those charged by such other supplier for comparable retail service to comparable classes of consumers;

"Provided, nothing in this act shall in any manner restrict or impair the right of any municipality to acquire, construct, expand, maintain, or operate any electric generation, transmission or distribution facilities within the corporate limits of said city, town or village in Arkansas as such limits may now exist or as such limits may exist upon the extension or expansion of the city limits of said city, town or village."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 827

ARKANSAS PUBLIC SERVICE COMMMISSION AND FIRST ELECTRIC COOPERATIVE CORPORATION ..... *Petitioners*

v.

ARKANSAS POWER & LIGHT COMPANY ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

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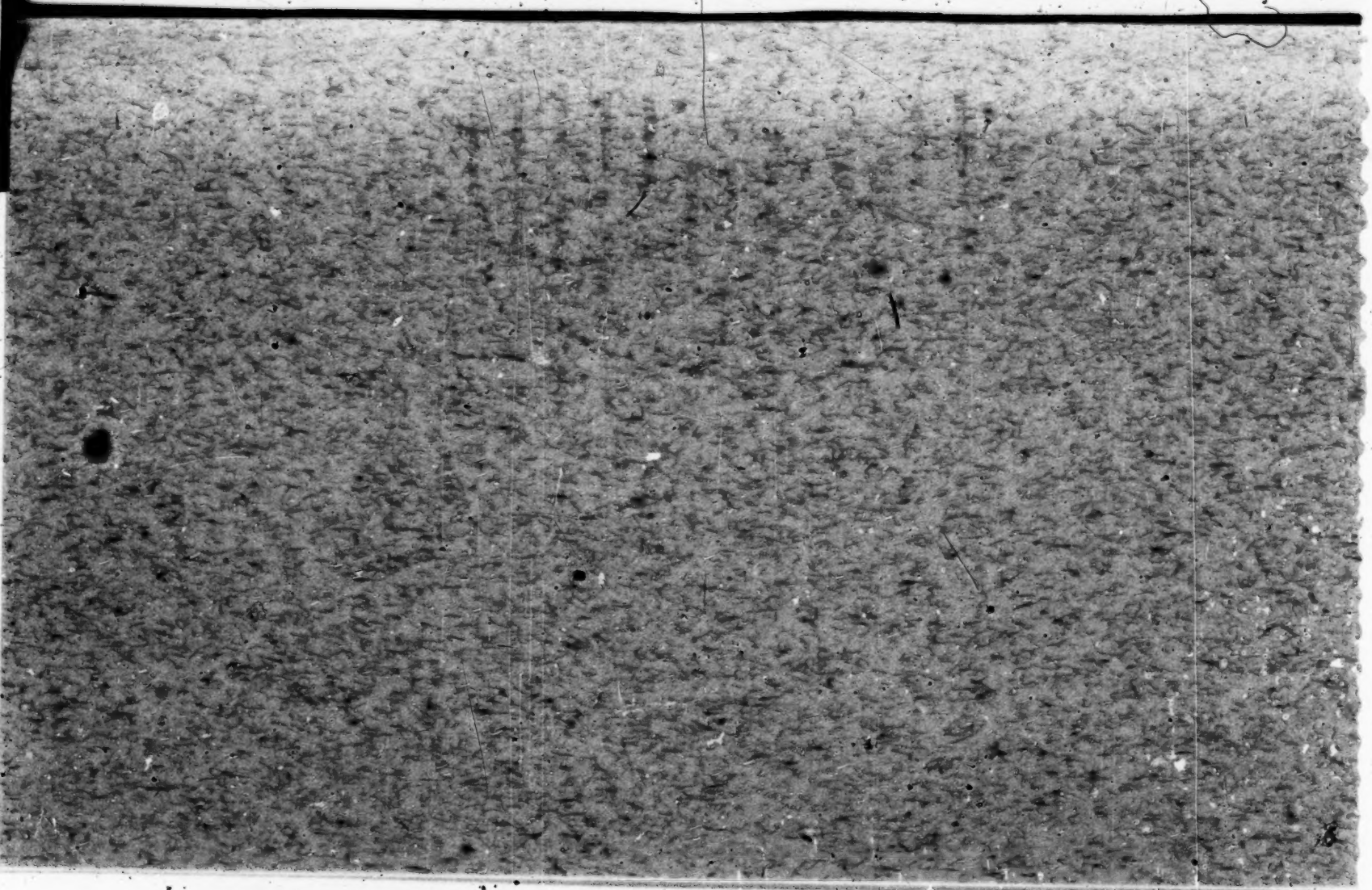

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 827

ARKANSAS PUBLIC SERVICE COMMISSION AND FIRST ELECTRIC COOPERATIVE CORPORATION ..... *Petitioners*

v.

ARKANSAS POWER & LIGHT COMPANY ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

Questions regarding alleged Constitutional rights under the Fourteenth Amendment were raised by Petitioner for the first time on rehearing before the State Supreme Court. Petitioner's statement that Federal questions were also raised in arguments before the Commission and lower courts is not sufficient for presentation of a Federal question. *Live Oak Ass'n.* v. *Railroad Comm.*, 269 U.S. 354, 357-8; *Lynch* v. *New York ex rel*

Pierson, 293 U.S. 52, 54. Attempted presentation of Federal questions in the Petition for Rehearing is not timely. *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128; *American Security Co.* v. *Baldwin*, 287 U.S. 156. Any right, title, privilege or immunity of Petitioner under the Constitution could have been raised long before the rehearing, but this was not done. Petitioner was bound to anticipate the probability of the Arkansas Supreme Court's ruling in light of prior decisions of the United States Supreme Court and the Arkansas Court on the issues in question. See *Leslie Miller* v. *State*, 227 Ark. 313; *Leslie Miller* v. *Arkansas*, 352 U. S. 187. The Arkansas Court adopted the position which Respondent had advanced in its Response to the Complaint before the Commission and at each stage of its subsequent appeals. Petitioner cannot now show or claim any surprise. *Herndon* v. *Georgia*, 295 U.S. 441.

QUESTIONS PRESENTED

1. Whether the doctrine of intergovernmental immunity forbids the application and enforcement of Arkansas utility service area allocation laws and regulations to electric contractor-suppliers, because it results in substantial interference with the Federal functions of selecting contractors and planning construction and operation of Federal facilities.

2. Whether the application and enforcement of Arkansas utility service area allocation laws and regulations against an electric contractor-supplier is invalid because in conflict with the Federal Armed Forces Procurement Law and regulations thereunder, prescribing the criteria and responsibility for selecting Federal contractors.

3. Does delivery of electric energy by a Power Company under contract with the United States, at a point where the Company has an exclusive franchise and a certificate of convenience and necessity from State authority, violate any constitutional rights of an electric co-operative, where the United States transmits a portion of the electric energy over a transmission and distribution system owner and operated by the United States and uses the energy in an area served by the co-operative under State law.

4. Was Act 103 of the Acts of Arkansas of 1957 lawfully enacted under provisions of the Arkansas Constitution; and if lawfully enacted, would Act 103 and the order of the Public Service Commission deprive the Power Company of constitutional rights guaranteed by the due process and equal protection clauses of Amendment XIV, and by Article I, Section 10 of the United States Constitution.

Constitutional Provisions Involved

1. United States Constitution—Amendment XIV
   Due Process Clause
   Equal Protection Clause
2. United States Constitution—Article VI
   Supremacy Clause
3. United States Constitution—Article I, Section 10

United States Statutes Involved

1. Title 41 United States Code

   Section 151 (c) (1)

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Arkansas Statutes Involved

1. Act 103, of Arkansas Acts of 1957, Section 3 (Ark. Stats. §73-240)

STATEMENT

This case began with a complaint of the First Electric Cooperative Corporation (hereafter called "Co-operative") which asked the Arkansas Public Service Commission (hereafter called "Commission") to issue an order requiring the Arkansas Power & Light Company (hereafter called "Power Company") to cease and desist furnishing electric service to the United States, which the United States may subsequently use in an air force housing project located on the Little Rock Air Force Base in certain territory which the Co-operative claims the right to serve.

The Air Base covers thousands of acres in Pulaski County, Arkansas. Some of the Base, and all of the housing project, is within the city limits of the City of Jacksonville, which municipality the Power Company serves under an exclusive franchise. Roughly one-half of the Air Base, outside the Jacksonville city limits, was in territory served by the Power Company under a certificate of convenience and necessity, and the other half was in territory served by the Co-operative under a similar certificate.

When the title to the Air Base was acquired by the United States, the Power Company and the Co-operative were notified that they must cease serving the area and remove all of their facilities therein. This was done, and each was paid for the facilities removed. Both utilities executed quitclaim deeds and releases to the United States and ceased serving any customers within the Air Base area.

Subsequently, appropriate Government agencies approached the Power Company and requested it to negotiate a contract for electric service to the Base. These negotiations were carried on under the provisions of the Armed Forces Procurement Act and regulations, and resulted in the contract dated February 19, 1954. This contract, which recites that it was negotiated under the provisions of Title 41 U.S.C., Sec. 151 (c)(1) and Presidential Proclamation 2914, provided for the purchase by the United States of electric energy under certain strict conditions and requirements, but the Power Company was not allowed to locate any facilities within the boundaries of the Base.

On August 30, 1957, the basic contract was amended from an indefinite term terminable on notice to a five year term and by applying different and less costly rate schedules, which became available by reason of the commitment to a five-year term. On October 4, 1957, the contract was again amended by providing for a restricted demand billing, which again reduced the cost of service. Except for these reductions in cost and extension of the term to five years, no changes were made in the basic contract of February 19, 1954.

Under the contract, as amended, the United States takes delivery of all power at the Company's substation located outside the Base, at a point within the city limits

of Jacksonville and within the service area allocated to the Power Company by the Arkansas Commission. All of the distribution and transmission facilities on the Air Base were constructed by, and are wholly owned and maintained by, the United States. Once the power is delivered to the United States at the Power Company's substation, the Company no longer has any control over it, and its use thereafter is subject wholly to the will of the United States. Since a portion of the physical plant of the Air Base (principally base personnel housing) is located in territory in which the Co-operative once held a certificate of convenience and necessity, some of the power purchased by the United States is distributed over Government owned facilities by the United States within such territory. It is this use of which the Co-operative complained.

During the hearing the Co-operative's proof made it clear that it intended to build whatever facilities were necessary to accept delivery of power from the Power Company and then sell the power to the Government. The Co-operative took the position that the United States had to buy all power consumed in the disputed territory from the Co-operative. (See Complaint, Appendix p. 17,18.)

In its order the Commission declared that Section 3 of Act 103 of 1957 (Appendix p. 22) and the Commission's earlier certificate of convenience and necessity were binding upon the Commission and all of the parties to this proceeding. Although it did not expressly say so, the Commission also necessarily held that Act 103 and Commission orders allocating territory were also binding upon the United States.

The Power Company appealed to the Pulaski County Circuit Court, denying the Company was violating any laws of the State or orders of the Commission, alleging

that Act 103 and the Commission's order were unlawful and resulted in a confiscation of the Company's property without due process of law as guaranteed by Amendment XIV of the United States Constitution; that Act 103 and the Commission's order violated Article 1, Section 10 of the United States Constitution by unlawfully impairing its contracts, and that the Commission's attempt to regulate and control the sale and usage of electric power to the United States at the Air Base was void and in conflict with the Armed Forces Procurement Laws and Regulations, and the immunity of the United States from State regulation. The Circuit Court affirmed the Commission's order and the Power Company appealed on the same grounds to the Arkansas Supreme Court.

A majority of the Supreme Court held that the Order of the Commission was necessarily based on an assertion of the right to regulate and control the identity of the electric supplier to the United States in any given area, and that all State laws and regulations attempting to do so were invalid because in conflict with Federal law. The Court also recognized that, if affirmed, the Commission's alleged "simplification" of its order would also result in confiscation of property of the Power Company and an unjust enrichment for the Co-operative.

ARGUMENT

REASONS WHY WRIT SHOULD NOT BE GRANTED

(1) No substantial Federal question is presented.

Petitioner has not presented any substantial Federal questions nor any legitimate reasons why this Court should exercise its discretionary jurisdiction. None of the considerations set forth in Rule 19 of this Court are alleged to exist by Petitioner and none do exist. There are no conflicts in the decisions of lower courts on the questions involved here, and the legal principles are well settled by recent decisions of this Court. *Leslie Miller* v. *Arkansas*, 352 U.S. 187; *Public Utilities Commission* v. *United States*, 355 U.S. 534. Except for these settled principles of law, which were recognized and correctly applied by the State Supreme Court, this case involves no questions of sufficient importance to justify review by this Court.

Petitioner's objections to the State Supreme Court decision, while couched in terms of the due process and equal protection clauses of the Fourteenth Amendment, are actually based upon a fancied judicial impairment of alleged contract rights and approval of alleged contract breaches. Petitioner did not expressly rely on the contract impairment clause of the Constitution (Article I, Section 10), but in any event, this clause may only be invoked where impairment is by legislative action. *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444. Under no circumstances can a breach of contract by the Power Company be turned into a Federal due process question, as Petitioner apparently contends. Nor was there any lack of hearing or right to be heard of which Petitioner can complain. The mere fact that the State Court held that

Petitioner cannot force the Power Company to cease serving the Government does not amount to a taking of property without due process. *Central Land Co.* v. *Laidley*, 159 U.S. 103; *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444.

(2) The decision below is clearly correct.

Constitutional immunity from State regulation of the property, functions and instrumentalities of the United States is firmly established (U.S. Const. Article VI; *Arizona* v. *California*, 283 U.S. 423). This immunity has frequently been extended to dealings of the Government with independent contractors where State regulations interfere in any substantial way with the performance by the Contractor of a Federal function. *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 104; *Smith* v. *Davis*, 323 U.S. 111, 115; *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 154; *Leslie Miller* v. *Arkansas*, 352 U.S. 187. The State Court properly recognized this immunity here.

The Co-operative contends that since the United States had not filed a notice of acceptance of jurisdiction under 40 U.S.C. 255 that it had no jurisdiction or immunity here. This same argument was rejected by this Court in connection with the Little Rock Air Force Base in *Leslie Miller* v. *Arkansas*, 352 U.S. 187. Miller was fined in a State court for bidding on an Air Base construction job without having complied with the Arkansas law requiring a contractor's license. The State Court upheld the validity of the regulatory law because the United States had not accepted jurisdiction over the Air Base under 40 U.S.C. 255. (*Leslie Miller* v. *State*, 225 Ark. 285, 281 S.W. 2d 946.) This Court reversed the Arkansas Court and held that the Arkansas regulatory law was

unenforceable against Miller.* The opinion expressly noted the lack of notice required by 40 U.S.C. 255 and obviously considered this factor to be immaterial. (See 352 U.S. at 187.)

The application of the rationale of *Leslie Miller* v. *Arkansas*, 352 U.S. 187, to this case is inescapable. The same procurement law and regulations are involved and 40 U.S.C. 255 was pleaded in both cases. The principle that the Government's right to contract with contractors of its own choosing and its immunity from state regulation of their identity and activity inure to the benefit of its contractors, is controlling here.

Here the Commission held that the Power Company's contract to supply electric energy to the United States was illegal under State laws to the extent that the energy is used in territory allocated to the Cooperative, and that the Company could not furnish such service. The Commission went much further than the Contractor's Licensing Board did in the regulation and licensing of contractors. Act 103 of 1957 and the Commission's order did not merely reduce the number of potential bidders, as in *Leslie Miller* v. *Arkansas*, *supra*, but rather, permanently limited the Government's potential suppliers of electricity to one co-operative.

Section 3 of Act 103 contains an absolute prohibition against service by the Power Company in any territory ever allocated to the Co-operative. (See Appendix, p. 22.) This prohibition collides head-on with the Federal right and policy to enter into contracts with those persons whom it determines to be best qualified to carry out the national

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* On remand the Arkansas Court entered a Per Curiam order conforming to the mandate of the Supreme Court and setting aside the judgment of the trial court. 227 Ark. 313, 298 S.W. 2d 44.

purpose. It is difficult to imagine a clearer case of conflict and interference with Federal functions. It is a much more basic conflict than that in *Public Utilities Commission* v. *United States*, 355 U.S. 534, which involved only rates and cost of service, but where the Court held that California could not subject the United States or its contractors to the discretionary authority of the State for the terms on which it can contract for services.

The test of validity of State regulation is whether that regulation interferes in any substantial way with the performance of Federal functions; and Federal contractors are exempt from State regulation if the regulation substantially hinders the contractors in serving the Government as they were intended to serve it. *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 154, 161; *Union Pacific Railroad* v. *Peniston*, 18 Wall 5, 33, 36.

There is no doubt that had the State Court not entered the decision it did, that the Power Company would be completely deprived of the power to serve the United States as the Government intended to be served. It therefore correctly held that the electric contract is immune from the application of State regulation.

A comprehensive scheme of procurement policies is found in the Armed Forces Procurement Act of 1947 (41 U.S.C. 151 *et seq.*) and the regulations thereunder, which have the force of law. *Standard Oil Co.* v. *Johnson*, 316 U.S. 481; *Public Utilities Comm.* v. *United States*, 355 U.S. 534. The Act sets forth sixteen situations in which contracts may be negotiated, including instances where it is in the interest of the national defense (41 U.S.C. 151 (c) (1). The guiding principle of the law is that resulting contracts be "most advantageous to the Government, price and other factors considered". (41 U.S.C. 152) The regulations under which Federal officials negotiated

the power contract, expand further upon the factors to be considered. Besides price, procurement officers must take into account, *inter alia*, the judgment, skill and integrity of the supplier, its reputation and experience, and other advantages or disadvantages to the Government. (32 CFR 1.307; 32 CFR 3.101) Determinations of Federal officials under the Act are final (41 U.S.C. 156).

Unlike the case of *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261, cited by Petitioner, where the Court found that the Army regulations expressly left applicability of state price legislation to be determined by the courts, and where the result of State Regulation would be merely an adjustment in cost to the Government (318 U.S. 276-278), Act 103 of 1957 and the Commission's order nullified the determination of Federal officials that the Power Company should supply all the electric energy at the Air Base under a single contract.

Petitioner argues that Paragraph 5 of the contract constitutes consent of the United States to subject itself to State control over the identity of electric suppliers. An attempt is made to give some substance to this position by the transparent device of quoting one sentence from Paragraph 5 completely out of context. Examination of the entire paragraph (Appendix p. 19) clearly reveals that the paragraph refers solely to rate regulation. Paragraph 5(a) deals with the filing of new rate schedules and formal rate regulation by the utility commission and 5(b) deals with amendments to and other changes in existing rate schedules. The majority opinion below correctly held that this was the intent of the paragraph. (See Opinion, Petition Appendix p. 41 at 49-50.) To hold otherwise would make the contract self-defeating, as compliance with State area allocation laws would have prevented the United States from selecting its own contractor-supplier and forced it to receive service from the

Co-operative. More importantly, it would have prevented the primary objective of the United States, i.e., construction of a single, integrated electric system on the Base. The record is filled with proof of the necessity of continuous service and the lengths to which the Government went to guarantee this type of service, which would not be available to it under a dual electric system. (See Opinion, Petition Appendix p. 43-46.)

Petitioner's argument that 50 U.S.C. 491 indicated a Congressional policy to submit to State regulatory jurisdiction is fallacious. First, this statute applies solely to the construction of special air warning and control installations. Secondly, Section 491 directs Government officials to utilize the facilities of utilities within their respective service areas "to the fullest extent practicable". The absence of such language in the Armed Forces Procurement laws is significant. Furthermore, since Section 491 only requires the secretary to take service area into account when he deems it "practicable", similar language in the Procurement law would not aid the Co-operative because the discretionary powers of Government officials were exercised and control over state authority.

(3) No rights of the Co-operative have been invaded by the Power Company.

The State Court's decision can readily be supported on substanital non-Federated grounds. A basic fallacy of the Co-operative's case is the claim that the contract between the Power Company and the United States constitutes an unlawful invasion of Co-operative territory, which it has a legal right to prevent. This argument is unsupported by any evidence or law. Section 3 of Act 103 for 1957, quoted and relied upon by the Commission, only prohibits public utilities from "furnishing electric services at retail and not for resale" in territory allocated

to co-operatives. Here, the Power Company does not furnish any electric service of any kind, retail or wholesale, to consumers in the housing project. Its sole connection with the Air Base is the sale of power to the United States, at wholesale, at a point where the Power Company is legally able to render service to those who demand it.

It is the Government that is distributing electric energy in the disputed area, not the Power Company. The Power Company has no contract with or obligations to any consumer in the housing project, does not meter individual usage, and does not bill or collect for power. No Company facilities are located within the Air Base, or connected directly with the distribution lines on the Base. This does not amount to an invasion of cooperative territory by the Company.

4. *The Commission's Order, as entered, was void even if there were no conflict with Federal Law.*

Petitioner argues that the Commission's Order did not affect the government and merely required the Power Company to meter the energy and account to the Cooperative for the energy used in Cooperative territory. If the Commission's Order did mean that the Power Company must pay or credit a portion of its gross earnings under the contract to the Cooperative, even though the Cooperative had no investment and performed no services, then the order is void. Such an order would result in the confiscation of the Company's property without due process of law, forbidden by Amendment XIV to the U.S. Constitution.

Since the Commission's Orders are legislative in nature (*Dept. of Public Utilities* v. *McConnell*, 198 Ark. 502, 130 S.W. 2d 9; *Live Oak Ass'n* v. *Railroad Commis-*

sion, 269 U.S. 354, 356) it would also result in an unlawful impairment of the Company's contract with the United States and its contract with the Cooperative, by retroactively reducing the benefits to the Company and adding additional burdens the Company did not contract to assume, *Columbia Ry. Gas Co.* v. *South Carolina*, 261 U.S. 236, Article I, Section 10, U.S. Constitution. Although the State Supreme Court did not find it necessary to expressly decide these constitutional questions, it did recognize the basic injustice of this interpretation of the order. (See Majority Opinion, Petition Appendix p. 41 at 42-43.) Furthermore, if the Cooperative's interpretation of the Commission Order were correct, the Commission in effect entered an award of damages, a judicial act it has no legal power to perform. (*See Dept. of Public Utilities* v. *McConnell*, 198 Ark. 502, 130 S.W. 2d 9).

Respondent also raised several other issues in its appeal to the State Court, which would have required a reversal of the Commission's Order, but which the Court did not reach in its decision because of its Court's finding of Federal immunity.

First, Act 103 was not lawfully adopted by the Legislature in accordance with the requirements of the Arkansas Constitution. (Article V Section 22 and Section 37, Appendix p. 23-24). These provisions require that each bill receive the vote of a "majority of each house" and that the votes be taken "by yeas and nays". Act 103 received only 18 votes in the Senate, 18 being a bare majority of the house. The eighteenth vote was cast by the Presiding Officer from a written "pair" filed by absent members. A "pair" is an agreement not to vote and cannot be counted as an affirmative vote, Webster's International Dictionary, 2d Ed. Unabridged, 1947;

Bovier's Law Dictionary (1928 Ed.); In Re opinion of the Justices, 228 Ala. 140, 143, 152 So. 901, 904. Since the Act was not validly enacted it cannot be enforced.

Second, the disputed area is in the City limits of Jacksonville in which the Company has an exclusive franchise. Application of Act 103 by the Commission would unlawfully impair the Company's contract rights under this franchise. (U. S. Const. Article I, Section 10) *Hot Springs Electric Co.* v. *Hot Springs*, 70 Ark. 300; *Columbia Ry. Gas Co.* v. *South Carolina*, 261 U.S. 236. Furthermore, the Cooperative has not obtained any municipal authority to use the City streets or sell electricity in the City.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

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Little Rock, Arkansas

Attorneys for Respondent

APPENDIX

BEFORE THE ARKANSAS PUBLIC SERVICE COMMISSION

FIRST ELECTRIC COOPERATIVE CORPORATION.....*Complainant*

v. No. U-1285

THE ARKANSAS POWER & LIGHT COMPANY.....*Defendant*

Complaint

Comes the above named plaintiff, by its attorney, Tom Gentry, and pursuant to Rule II of this Commission, herewith files its complaint against the above named defendant, and for its complaint states and alleges:

I

That the complainant is an Electric Cooperative Corporation organized and existing under and by virtue of the laws of the State of Arkansas, and engaged in the transmission and selling of electric power and energy to its various customers in the territory in the State of Arkansas heretofore granted to it by this Commission. That the defendant is a Public Utility Corporation, organized and existing under and by virtue of the laws of the State of Arkansas and engaged in the business of generating, transmitting and selling electric power to the general public within the territory assigned to it in the State of Arkansas by this Commission.

Complainant further states that this Commission in 1937, in docket U. 226 granted to it a certificate of public convenience and necessity to serve the following described area, in Pulaski County, Arkansas, to wit: Sections 15, 10, 3 N½ of Section 2 and Sections 1 in Twp. 3 North, Range 11 west, and Sections 6 and 7 in Twp. 3 north,

Range 10 west, a part of which now makes up the Little Rock Air Force Base of the United States Government, located near Jacksonville, Arkansas.

Complainant further states that the users of electric power and energy in the above described territory, under the certificate of public convenience and necessity, heretofore granted to it by this Commission, must be exclusively served electric power and energy by complainant by virtue of Act 103 of the 1957 Acts of the General Assembly of the State of Arkansas, as well as under the original order of this Commission which granted said territory to this complainant.

Complainant further states that the said defendant, Arkansas Power & Light Company, is now serving and providing and offering to serve or provide electric power and energy to the user or users thereof at retail and not for re-sale in said territory in violation of the orders of this Commission and in violation of the laws of the State of Arkansas.

Complainant further states that it is ready, willing and able to serve and provide electric energy or power to the user or users and any future user or users of electric power or energy in said territory or area.

Wherefore, premises considered, the complainant prays that this commission, in order to enforce its previous order assigning territory to this complainant and to enforce compliance with the Statutes of the State of Arkansas, issue its order directing the defendant, Arkansas Power & Light Company, to cease and desist from

furnishing, supplying or serving or offering to furnish, supply or serve electric power to any user or users at retail and not for re-sale for use or consumption in the above described territory.

FIRST ELECTRIC COOPERATIVE CORPORATION

By: /s/ Tom Gentry

Its Attorney

117 National Old Line Building
Little Rock, Arkansas

PARAGRAPH 5 OF CONTRACT, DATED FEBRUARY 19, 1954, BETWEEN THE ARKANSAS POWER & LIGHT COMPANY AND THE UNITED STATES

"5. *Public Regulation and Change of Rates.* (a) Public regulation. Service furnished under this contract shall be subject to regulation in the manner and to the extent prescribed by law by any Federal, State, or local regulatory commission having jurisdiction. If during the term of this contract the public regulatory commission having jurisdiction receives for file in authorized manner rates that are higher or rates that are lower than these stipulated herein for like conditions of service, the Contractor agrees to continue to furnish service as stipulated in this contract and the Government agrees to pay for such service at the higher or lower rates from and after the date when such rates are made effective.

(b) Change of rates. (1) Subject to paragraph (a) of this clause, in the event the Contractor, during the term of this contract, shall make effective any new rate schedule or amend rate schedule applicable to the class of service furnished the Government at the service location which may contain a lower rate or conditions more favor-

able to the Government for such class of service, the Contractor shall forward to the Contracting Officer a copy of such rate schedule or amended rate schedule within fifteen (15) days after the effective date thereof, and, upon receipt of written request from the Government, shall substitute such rate schedule or amended rate schedule for the rate schedule then in effect hereunder for such service location, commencing with the billing period in which such written request is received.

(ii) Subject to paragraph (a) of this clause, in the event of a permanent change in the class of service furnished the Government at the service location, service shall, effective sixty (60) days after written request is made by either party or at such other time as may be agreed upon, thereafter be furnished to such service location at the lowest available rate schedule of the Contractor which is applicable to the class of service furnished following such permanent change."

UNITED STATES STATUTORY PROVISIONS

Title 41 U.S.C. Section 151——

> §*151. Purchases and contractors for supplies and services—(a) Applicability to all Armed Services.*
>
> "The provisions of this chapter shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds."
>
> • • • •

"(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

"(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;"

Title 41 U.S.C. Section 153——

"*§153. Types of contracts—(a) Discretion of agency head; warranty clause.*

"Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 151(c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. • • •"

Title 41 U.S.C. 156——

"*§156. Determination and decisions—(a) Powers of agency head; finality; delegation.*

"*The determinations and decisions provided in this chapter* to be made by the agency head may be tracts or with respect to classes of purchases or made with respect to individual purchases and concontracts, and *shall be final.* Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this chapter, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency."

ARKANSAS STATUTORY PROVISIONS

Section 3 of Act 103 of 1957 (Ark. Stat. §73-240)

"*Section* 3. Section forty-one (41) of Act 324 of the Acts of the General Assembly of Arkansas of 1935, as amended (Arkansas Statutes, Section 73-240) is hereby amended to read as follows:

" 'No new construction or operation of any equipment or facilities for supplying a public service, or extension thereof, shall be undertaken without first obtaining from the Department (Commission) a certificate that public convenience and necessity require, or will require, such construction or operation; provided that if such construction or operation has been commenced under a limited or conditional certificate, or authority as hereinafter provided in Section 43 (Section 73-242), this Section shall not be construed to require such certificate nor shall such certificate be required for an extension within any municipality or district within which service has heretofore been lawfully supplied, or for an extension within, or to territory then being served, or necessary in the ordinary course.

" 'Notwithstanding the provisions of " is Act or any other provisions of law, or the terms of any certificate of convenience and necessity, franchise, permit, license or other authority granted to a public utility by the State or a municipality no public utility shall furnish or offer to furnish electric service at retail and not for re-sale in any area heretofore allocated by the Commission to an electric cooperative corporation pursuant to Section 31 of Act 342 of the Acts of the General Assembly of 1937 (Arkansas Statutes, Section 77-1131).' "

United States Constitution

Article I, Section 10:

"§10. [Powers denied the states.]—(1.) No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility."

United States Constitution

Article VI, Section 2:

"(2.) This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Arkansas Constitution

Article V, Section 22:

"*Passage of bills.*—Every bill shall be read at length on three different days in each house, unless the rules be suspended by two-thirds of the house, when the same may be read a second or third time on the same day; and no bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the persons voting for and against the same be entered on the journal, and a majority of each house be recorded thereon as voting in its favor."

Arkansas Constitution

Article V, Section 37:

"*Laws—Enactment—Majority required.*—Sec. 1. Not less than a majority of the members of each House of the General Assembly may enact a law."